In the Supreme Court of the United States

October Term, 1976
No. 76-409

BOARD OF TRUSTEES OF BLOOMSBURG STATE COLLEGE; DR. ROBERT NOSSEN; DR. CHARLES CARLSON; JOHN PITTENGER, SUPERINTENDENT OF EDUCATION, COMMONWEALTH OF PENNSYLVANIA; and BLOOMSBURG STATE COLLEGE,

Petitioners

v.

DR. JOSEPH T. SKEHAN,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

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v.

DR. JOSEPH T. SKEHAN,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioners, Board of Trustees of Bloomsburg State College, Dr. Robert Nossen, Dr. Charles Carlson, John Pittenger, Superintendent of Education, Commonwealth of Pennsylvania and Bloomsburg State College hereby petition that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Third Circuit entered in this case on June 21, 1976.

OPINIONS BELOW

The opinion and judgment of the Court of Appeals of June 21, 1976, has not been published but is printed in the Appendix, pp. 1a-24a. The initial opinion of the United States District Court for the Middle District of Pennsylvania of May 9, 1973, as amended May 14, and May 17, 1973, is reported at 358 F. Supp. 430 and is printed in the Appendix, pp. 55a-66a. The order of the District Court of June 12, 1973 denying plaintiff's motions to amend judgment and allowance of attorney's fees and costs is not reported but is printed in the Appendix, 67a-69a. The earlier opinion and judgment of the Court of Appeals of May 3, 1974, as amended June 11, 1974, is reported at 501 F.2d 31 and are printed in the Appendix at 26a-54a. The previous order of this Court is reported at 421 U.S. 983 (1975) and is printed in the Appendix at 25a.

JURISDICTION

The opinion of the Court of Appeals for the Third Circuit was issued on June 21, 1976. This petition for a writ of certiorari was filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Does the Eleventh Amendment to the Constitution of the United States prohibit the award of attorneys' fees against an agency of a State, absent statutory authorization for the award pursuant to Section 5 of the Fourteenth Amendment?

2. May attorneys' fees be awarded against state officials in their individual capacities for pre-litigation obduracy?

3. Should the immunity of defendant state officials from a damage action have been determined as a matter of law on the existing record?

CONSTITUTIONAL PROVISION INVOLVED

The Eleventh Amendment to the Constitution of the United States provides as follows:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

STATEMENT OF THE CASE

Plaintiff-respondent was appointed an Associate Professor of Economics at Bloomsburg State College in January, 1969. In May, 1970, respondent was offered a terminal one year contract with the College for the 1970-71 academic year. Respondent appealed his one year termination contract to the Board of Trustees, and was subsequently informed by petitioner Nossen, then President of Bloomsburg, that the Board had determined that his appointment for the 1970-71 school year would be terminal.

During the 1970 fall semester a class scheduling dispute arose in the Department of Economics, causing petitioner Nossen to dismiss respondent from his employment. On October 23, 1970, the Board of Trustees terminated respondent's employment effective October 17, 1970. On December 1, 1970, a post-termination hearing was held and the Hearing Committee confirmed the decision to dismiss respondent.

This suit was filed October 10, 1972 in the United States District Court for the Eastern District of Pennsylvania and was subsequently transferred to the Middle District of Pennsylvania. The complaint alleged a violation of respondent's First and Fourteenth Amendment rights. The relief sought included reinstatement, back pay, costs, and attorneys' fees.

On May 9, 1973, the District Court, after hearing, issued its final decision. The court held that respondent's mid-year discharge did not violate his rights under the

First Amendment and that the sole reason for the discharge was the class scheduling dispute (61a). The court also held that the mid-contract dismissal without a prior hearing violated respondent's right to procedural due process (62a). Based on its finding that the deprivation of respondent's constitutional right was technical in nature (65a), the District Court awarded respondent nominal damages. Respondent's motions to amend judgment and for the allowance of attorneys' fees were denied by the District Court on June 12, 1973, because of the technical nature of the constitutional violation; petitioners' lack of bad faith, and because of the fact that the vindication of respondent's right did not confer a benefit on any group (69a).

On May 3, 1974, the Court of Appeals for the Third Circuit affirmed the findings of the District Court that respondent's right to due process had been violated by the failure of the College to give respondent a hearing prior to his mid-year dismissal (36a-37a). The Third Circuit vacated and remanded for further findings as to whether the decision to offer respondent a terminal year appointment for the 1970-71 school year violated his contractual rights or rights under the First Amendment.

The Court of Appeals further held, on the basis of *Edelman v. Jordan,* 415 U.S. 651 (1974), that the Eleventh Amendment barred the award of damages against the Commonwealth, and that if Bloomsburg State College shared the Commonwealth's Eleventh Amendment protection, the District Court could not order that it pay attorneys' fees (47a). Finally, the Circuit Court held that respondent could not recover damages from the individual defendants, protected by official immunity, because they exercised discretionary governmental functions and had not acted in bad faith (48a-49a).

Respondent thereafter filed a petition for certiorari. This Court on May 27, 1975, granted respondent's petition, vacated the Third Circuit's opinion and remanded the case to the Third Circuit for further consideration in light of *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240 (1975), and *Wood v. Strickland,* 420 U.S. 308 (1975) (25a).

On remand from the Supreme Court, the Third Circuit, *en banc,* held that despite this Court's holding in *Alyeska,* supra, attorneys' fees could be awarded against a fendant for obduracy prior to litigation (10a). The Court also ruled that although Bloomsburg State College, under state law, shared the Commonwealth's Eleventh Amendment protection (20a), nevertheless attorneys' fees could be awarded against the College, and therefore the Commonwealth, for bad faith in the conduct of litigation (11a-12a). Finally, upon consideration of *Wood v. Strickland,* supra, the Court below ruled that the District Court should reconsider the qualified immunity afforded the individual defendants. Petitioners herein seek a writ of certiorari for this Court to review the decision of the Third Circuit Court of Appeals.

REASONS FOR GRANTING THE WRIT

1. The Opinion of the Circuit Court That the Eleventh Amendment Does Not Bar an Award of Attorneys' Fees Against a State Agency for Bad Faith in the Conduct of Litigation Is in Direct Conflict With Opinions Rendered by Other Circuit Courts and Raises a Substantial Constitutional Question

The Court below held that although Bloomsburg State College[1] shares the Commonwealth's immunity, *Brungard v. Hartman,* 12 Pa. Commonwealth Ct. 477, 315 A.2d 913 (1974), an award of attorneys' fees against the College would nevertheless be proper if the College was found to be obdurate in the course of this litigation (20a). This holding squarely conflicts with the opinion of a panel of the Fourth Circuit in *Hallmark Clinic v. North Carolina Department of Human Resources,* 519 F.2d 1315 (4th Cir. 1975). The court in *Hallmark* held that the Eleventh Amendment barred the award of attorneys' fees against a state agency.[2]

[1] Although Bloomsburg State College is not a person within the meaning of 42 U.S.C. §1983, the Circuit Court in first considering this case held it a proper party under the invocation of 28 U.S.C. §1331 jurisdiction.

[2] In *Thonen v. Jenkins,* 517 F.2d 3 (4th Cir. 1975), a different panel of the Fourth Circuit held that the Eleventh Amendment did not bar an award of attorneys' fees against state officers sued in their individual capacities. That precise issue, not present in this petition is before this Court in *Bond v. Stanton,*

The opinion of the Third Circuit in this case also squarely conflicts with the view of the Sixth Circuit as expressed in *Jordan v. Gilligan,* 500 F.2d 701 (6th Cir. 1974), *cert. den.* 421 U.S. 991 (1975):

> ". . . [T]he Eleventh Amendment prohibits the awarding of attorneys' fees against unconsenting sovereign states." 500 F.2d at 701.[3]

There is no way in which the opinion of the Third Circuit can be reconciled with the opinions of the Fourth and Sixth Circuits. Had this action been brought in either the Fourth or Sixth Circuit, the Eleventh Amendment would have been held to bar an award of attorneys' fees against Bloomsburg State College. Only by granting this petition and reviewing the Third Circuit's holding can this conflict in the circuits be resolved.

Both the Fourth and Sixth Circuits relied on this Court's opinion in *Edelman v. Jordan,* 415 U.S. 651

528 F.2d 688 (7th Cir. 1976), *cert. granted,* —— U.S. ——, 96 S.Ct. 2224 (1976) (Mr. Justice Stevens not participating).

The holdings of the Fourth Circuit in *Hallmark,* supra, and *Thonen,* indicate that this Court's consideration of *Bond,* will not be dispositive of the question presented here, whether the Eleventh bars an award of attorneys' fees against a state *agency.* Therefore, in addition to the reasons presented in the text, *infra,* pp. 9-17 for granting this Petition, petitioners assert that the complete question of the effect of the Eleventh Amendment on the award of attorneys' fees can only be fully adjudicated by consideration of this case in conjunction with *Bond.*

[3] The *Jordan v. Gilligan,* 500 F.2d at 708-09, court relied heavily on the Third Circuit's initial opinion in this case, 501 F.2d 31 (3d Cir. 1974), holding that "*Edelman* [*v. Jordan,* 415 U.S. 651 (1974)], while not ruling on the matter specifically, appears to bar the award of attorneys' fees from the state treasury as well." 501 F.2d at 42.

(1974), in holding that the Eleventh Amendment prohibited an award of attorneys' fees against a State or state agency. *Edelman* teaches that a federal court may require the expenditure of state funds if the expenditure is a necessary consequence to future compliance with prospective injunctive relief. The Eleventh Amendment however operates as a jurisdictional bar to a retroactive award of monetary compensation from a State treasury.

The Third Circuit attempts to circumvent the Eleventh Amendment and *Edelman*, supra, by analogizing an award of attorneys' fees for bad faith in the course of litigation to an award of costs against the State, permitted by *Fairmont Creamery Co. v. Minnesota*, 275 U.S. 70 (1927). That case held that the then current rules of the Supreme Court, as well as section 254 of the Judicial Code (28 U.S.C. §352), authorizing the taxing of the cost of printing of the record against the losing party in a Supreme Court action, was sufficient authority for the costs taxed to be paid by the State of Minnesota. The Eleventh Amendment is not specifically discussed by the Court. Nor does that opinion lend support to the lower Court's proposition that attorneys' fees for bad faith litigation are analogous to costs.

In *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), this Court considered whether Congress has changed the general statutory rule that allowances for counsel fees are limited to the sums specified in the costs statutes (28 U.S.C. §§1920 and 1923(a)). The principle enunciated in *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 719 (1967), that the costs statutes are a general exception to the "American rule" regarding taxation of attorneys' fees was reaffirmed. Since

the authority to tax costs is limited to specified items, not including attorneys' fees for bad faith litigation practices, there is simply no authority upon which the Circuit Court could rely in concluding that attorneys' fees for bad faith litigation practices are analogous to costs. *See, Fleischer v. Paramount Pictures Corporation*, 329 F.2d 424 (2d Cir. 1964), *cert. den. sub nom. Fleischer v. A.A.P., Inc.*, 379 U.S. 835 (1964); *cf. Sanford Research Co. v. Eberhard Faber Pen and Pencil Co.*, 379 F.2d 512, 517 (7th Cir. 1967).

Moreover, this Court in *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939), recognized the inherent power of an equity court to award attorneys' fees in particular situations. But the *Sprague* Court clearly indicated that attorneys' fees are not within the ambit of ordinary taxable costs, "They [costs between solicitor and client] are not of a routine character like ordinary taxable costs," 307 U.S. at 168. *See also, id.*, 307 U.S. at 164. Thus, attorneys' fees, awarded for whatever reason, are not costs, and the Third Circuit improperly relied on *Fairmont Creamery Co.* to authorize an award of attorneys' fees against a State agency.

The Third Circuit also suggests that this Court's summary affirmance of *Sims v. Amos*, 340 F. Supp. 691 (M.D. Ala. 1972), in *Amos v. Sims*, 409 U.S. 942 (1972), is authority to grant attorneys' fees against a State for bad faith litigation (12a). The strength of that authority however is severely tested by this Court's statement in *Edelman*, supra, that summary affirmances, particularly on constitutional questions, are not of controlling precedential value. 415 U.S. at 671. Reliance on *Sims* is therefore misplaced.

That the Third Circuit improperly evaded the Eleventh Amendment bar to the award of attorneys' fees

amply demonstrates the confusion of the Courts over this issue. That the application of the Eleventh Amendment to such awards is a substantial constitutional question has been recognized by this Court on at least two occasions. Recently, in *Fitzpatrick v. Bitzer,* U.S. , 96 S.Ct. 1666 (1976), this Court held that Congress, pursuant to its power under Section 5 of the Fourteenth Amendment, properly authorized an award of attorneys' fees against a State by statute (42 U.S.C. §2000e-5(1)(c).[4] This Court specifically refused to determine the application of the Eleventh Amendment to cases where there is no statutory authority for awarding attorneys' fees against a State. That is the precise issue presented in this petition.

And, in *Alyeska*, supra, the Court noted:

> "[A]n award [of attorneys' fees] against a state government would raise a question with respect to its permissibility under the Eleventh Amendment, a question on which the lower courts are divided." (Citations omitted.) 421 U.S. at 269, n. 44.

The question, whether the Eleventh Amendment bars an award of attorneys' fees against a State or State agency, raises a substantial constitutional question and divides the circuits. The impasse can be resolved by granting this Petition and issuing the requested writ.

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[4] The Third Circuit properly found no statute authorizing attorneys' fees in this civil rights action brought under 42 U.S.C. §1983.

II. The Holding of the Circuit Court Allowing an Award of Attorneys' Fees as an Element of Damages for Vexation or Oppression Prior to Litigation Exceeds the Holding of This Court in Alyeska Pipeline Service Company v. Wilderness Society, 421 U.S. 240 (1975)

In *Alyeska Pipeline*, supra, this Court recognized four exceptions to the American rule which ordinarily prevents a prevailing litigant from collecting reasonable attorneys' fees from the loser. The four recognized exceptions are: (1) when there is specific statutory or contractual authority for the award of attorneys' fees; (2) when a common fund has been created as a result of litigation, (3) when a party wilfully disobeys a court's order, and (4) when the losing party acts in bad faith or for oppressive reasons during the course of litigation.

Exceeding the bounds of *Alyeska*, the Court below created a new fifth exception to the American rule. The Third Circuit held that attorneys' fees may be awarded against individual defendants as an element of damages for bad faith or obduracy prior to the initiation of suits (8a-10a).

Vaughan v. Atkinson, 369 U.S. 527 (1902), was cited by the lower Court for the proposition that prelitigation bad faith is a proper basis for the award of attorneys' fees. *Vaughan*, however, is a case in admiralty and this Court's opinion in that case, although it does speak broadly of the inherent powers of a court in equity, is specific in limiting the applicability of its holding to admiralty cases, 369 U.S. at 530. The allowance of attorneys' fees in *The Appollon*, 22 U.S. [9 Wheat.] 362 (1824), and

Vaughan, simply reflects the long held view that, "in admiralty suits . . . attorney's fees have historically been viewed as an item of compensatory damages. (footnote omitted)." Comment, *Court Award of Attorney's Fees and Equal Access to the Courts,* 122 U. Pa. L. Rev. 636, 645 (1974).

The citation of *Vaughan,* in *F. D. Rich Co. v. Industrial Lumber Co.,* 417 U.S. 116 (1974), and the later citation of *F. D. Rich,* in *Alyeska,* only indicates the continued vitality of *Vaughan* in its limited context. In neither *F. D. Rich* nor *Alyeska* did this Court hold historic admiralty considerations to be applicable to actions in equity. The mere citation of *Vaughan* in *F. D. Rich,* along with nonadmiralty cases, found so important by the Court below (10a), is an insufficient basis upon which to apply traditional admiralty considerations to civil rights damage actions. Otherwise, a previously unrecognized exception to the "American rule" would be applicable to civil actions generally.

If the allowance of attorneys' fees for obduracy prior to litigation is to become a new judicial exception to the American rule, the exception should be defined by this Court. Without guidance or authority, the Third Circuit applied admiralty considerations to this action. This Court should review that holding and find that the Court below exceeded this Court's mandate on remand by grafting a further exception onto the "American rule" governing attorneys' fees—an exception not recognized by this Court in *Alyeska.*

III. The Failure of the Circuit Court To Determine the Immunity of Defendants Exceeds This Court's Previous Order and Raises a Substantial Question of Public Policy and Judicial Economy

The District Court, finding a technical violation of plaintiff's constitutional rights held, as a conclusion of law (65a), that the defendants were not guilty of bad faith in improperly discharging the plaintiff (65a, 69a). The Third Circuit, applying *Scheuer v. Rhodes,* 416 U.S. 232 (1974), initially held the individual defendants officially immune from damages. This Court remanded the case for reconsideration in light of *Wood v. Strickland,* 420 U.S. 308 (1975) (25a).

The only new element injected into this case by *Wood* is the immunity standard applicable to school officials:

> "[A] school board member is not immune from liability for damages under §1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student."

The latter requirement for the imposition of damages was held by the District Court not to be present in this action. The constitutional deprivation "was not the product of bad faith on the part of Defendants." (69a) Therefore, the only issue before the Circuit Court on remand was whether defendants knew or reasonably should have known that their actions violated plaintiff's constitutional rights.

This Court should make clear that a state official—as a matter of law—cannot know nor reasonably be presumed to know that his actions are violative of the Constitution until this Court itself has announced that that particular type of action is constitutionally impermissible.

Where the law which will govern a public official's action has not been specifically determined by this Court prior to the time the official acts, that official—as a matter of law and logic—is immune from liability insofar as the "know or reasonably should have known" criterion of *Wood v. Strickland* is concerned. This Court should announce that as a matter of judicial economy, lower courts in civil rights damage actions should make such immunity determinations at the earliest opportunity. Here, that issue was ripe for decision on remand from this Court.

As a matter of law, defendants could not have known that their actions would violate plaintiff's constitutional rights. This Court's opinions in *Board of Regents v. Roth,* 408 U.S. 564 (1972), and *Perry v. Sindermann,* 408 U.S. 593 (1972), were not issued until almost two years after plaintiffs dismissal. The defendants are not "charged with predicting the future course of constitutional law. *Pierson v. Ray,* 386 U.S. 547, 557 (1967); *Wood v. Strickland,* supra, 420 U.S. at 322; *O'Connor v. Donaldson,* 422 U.S. 563, 577 (1975). And indeed, *Roth* and *Sindermann*, both subsequent to the actions complained of, were the primary cases on which the District and Circuit Courts initially relied (61a-62a, 37a). Thus, the Third Circuit should have confined its opinion to the new issue presented by *Wood v. Strickland* and found, as a matter of law, that defendants were entitled to their conditional immunity.

While the Circuit Court may have believed that immunity is an affirmative defense to be decided on an evi-

dentiary record, *Imbler v. Pachtman,* U.S. , 96 S.Ct. 984 (1976); *cf. O'Connor v. Donaldson,* supra, *Safeguard Mutual Insurance Co. v. Miller,* 472 F.2d 732 (3d Cir. 1973), petitioners submit that the question of a defendants knowledge, when possible, should be made on the pleadings. As with other affirmative defenses, such as the statute of limitations and res judicata, the public policy encouraging judicial economy compels an immunity determination at the earliest possible time. If the ruling of the Third Circuit is followed, valuable judicial time and effort will be wasted. In civil rights actions, such as this, where damages are sought, a full trial must first be had to determine the existence of a constitutional deprivation. If the deprivation occurred, further evidence would then be required to determine the scope of a defendant's immunity. An opinion from this Court holding that when immunity is patently obvious as a matter of law on the pleadings or existing record further evidentiary proceedings are not necessary would avoid this potential misuse of judicial resources. This important question of judicial economy and public policy can be determined by reviewing the opinion of the Third Circuit in this case.

CONCLUSION

For the above stated reasons, petitioners respectfully request that the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit be granted.

Respectfully submitted,
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UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 73-1613

DR. JOSEPH T. SKEHAN,
Appellant

v.

BOARD OF TRUSTEES OF BLOOMSBURG STATE COLLEGE AND DR. ROBERT NOSSEN AND DR. CHARLES CARLSON AND JOHN PITTENGER, SUPERINTENDENT OF EDUCATION, COMMONWEALTH OF PENNSYLVANIA AND BLOOMSBURG STATE COLLEGE,
Appellees

(D.C. Civil Action No. 72-644)

Rehearing In Banc Argued May 13, 1976

Before SEITZ, *Chief Judge*, BIGGS, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges*

OPINION ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES
(Filed June 21, 1976)

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GIBBONS, *Circuit Judge*

This case is before us on remand from the Supreme Court. In August 1972 Joseph Skehan, formerly a non-tenured Associate Professor of Economics at Bloomsburg State College in Pennsylvania, sued in the district court seeking preliminary and permanent injunctive relief of reinstatement and back pay to that position, declaratory relief that his termination from the position was unconstitutional, punitive damages and attorney's fees. The defendants in the action were Bloomsburg State College; its Board of Trustees; Dr. Robert Nossen, its President; his successor to the presidency, Dr. Charles Carlson; and John Pittenger, Pennsylvania's Superintendent of Education.

The district court found that Skehan's one year employment contract was an interest in the nature of property; that its termination without an adequate hearing violated due process; and that the termination was not, as alleged, in retaliation for engaging in activity protected by the first amendment.[1] The court did not decide whether the college's prior decision not to renew Skehan's contract,[2] which had the effect of preventing him from achieving

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[1] Skehan alleged in his complaint that the college terminated him for his controversial stand on political issues, and especially for his trenchant criticism of the Vietnam War. The district court found that Skehan had been fired for disregarding directives from the college administration relating to the scheduling of classes.

[2] Skehan had been employed in January of 1969. This contract extended through the 1969-70 school year. In May, 1970 Skehan was notified that his contract would be renewed for the following academic year, but would not be renewed beyond that date. Skehan resumed his teaching duties for the terminal year of his contract in September, 1970. President Nossen fired

tenure, was made in reprisal for activities protected by the first amendment. Nor did it decide whether Skehan had a contractual right to a so-called "academic freedom" hearing prior to the college's decision not to renew his appointment.[3]

On appeal we affirmed the district court's determinations that the termination of Skehan's one year contract violated due process and that the termination was not in retaliation for the exercise of first amendment rights. We concluded that the court should have considered his claim that the non-renewal decision was so motivated, and should have decided his claim to a contractual "academic freedom" hearing prior to termination. We held that the individual defendants, exercising discretionary governmental functions, were immune from suits for money damages. We instructed the district court to determine whether the college was an entity as to which Pennsylvania asserted sovereign immunity. If the college did not share the Commonwealth's immunity, the district court was instructed to consider making an award of back pay and an award of attorney's fees. Otherwise it was to deny an award of back pay or attorney's fees.[4] Skehan filed a petition for certiorari. On May 27, 1975 the Supreme Court ordered that the judgment of this court be vacated and the case be remanded to this court for further consideration in light of *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240 (1975), and *Wood v. Strickland,* 420 U.S. 308

Skehan on October 19, 1970; the dismissal was confirmed by the Board of Trustees of the college on October 23.

[3] Skehan v. Board of Trustees of Bloomsburg State College, 353 F. Supp. 542 (M.D. Pa. 1973).

[4] Skehan v. Board of Trustees of Bloomsburg State College, 501 F.2d 31 (3d Cir. 1974).

(1975).[5] We decided to review the case in banc, and requested supplemental briefing. We now turn to a consideration of our prior decision in light of the Supreme Court's mandate.

I. *Alyeska Pipeline Service Co. v. Wilderness Society*

We previously held that Skehan, as a private attorney general vindicating a public interest in having state-related institutions act in compliance with the fourteenth amendment, was entitled to an award of attorney's fees from Bloomsburg State College provided the college did not share the sovereign immunity of the Commonwealth of Pennsylvania.[5a] *Alyeska Pipeline Service Co. v. Wilderness Society, supra,* overrules the cases on which we relied and which recognized that basis for the award of attorney's fees. It holds that absent (1) a contract or statute granting a right to attorney's fees; (2) the conferring of a common benefit by the recovery of a fund or property; (3) willful disobedience of a court order; or (4) a finding that the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons, federal courts must apply the American rule requiring each party to pay from his own pocket for the services of his attorney. Skehan points to no statute which would justify an award of attorney's fees,[6] but he urges that because primary emphasis was

[5] Skehan v. Board of Trustees of Bloomsburg State College, 421 U.S. 983 (1975).

[5a] In Part III of this opinion we hold that Bloomsburg State College does enjoy the Commonwealth's immunity.

[6] Skehan brings this action under the Civil Rights Act, 42 U.S.C. §1983, and admits in his brief that this section does not

placed on the now-discredited but once-respectable private attorney general theory, we should still remand for appropriate findings by the district court on both the common benefit and bad faith exceptions to the American rule.

The common benefit theory will not avail Skehan in this case. While it is true that the public at large benefits from making public institutions act in accordance with the demands of due process, Skehan is not attempting to assess against those benefited members a fair share of the reasonable value of the attorney's services which created the benefit. *Compare Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 163 (3d Cir. 1973); *Merola v. Atlantic Richfield Co.*, 493 F.2d 292 (3d Cir. 1974); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (3d Cir. 1974); *Grunin v. International House of Pancakes*, 513 F.2d 114 (8th Cir. 1975). Instead, he is attempting to charge the losing party for the reasonable value of attorney's fees which conferred that intangible benefit on an unascertainable class not within the court's jurisdiction. In *Hall v. Cole*, 412 U.S. 1 (1973), the Court applied the common benefit theory to justify a fee award for conferring a common but intangible benefit—the protection of first amendment rights. But there the Court could assess the fee against a union treasury, and thus shift the cost of litigation to an ascertainable class of union members who had been benefited. Skehan would have us analogize a union treasury to the treasury of the college. But the analogy between union dues in a union treasury and public funds in the college treasury is remote at best. Moreover, in *Hall v. Cole* it was quite clear

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allow for the recovery of attorney's fees. *See* Brief for Plaintiff-Appellant on Remand from the Supreme Court at 10.

who were the beneficiaries of increased union democracy and fairer operation of the union. In this case there would be no way of telling whether, if attorney's fees were assessed against the college, the cost would ultimately be borne by those parts of the college's several constituencies —students, faculty, and the tax-paying public—which actually benefited. We share Judge Wright's view that to apply the common benefit theory to assess attorney's fees against a losing party "would . . . stretch it totally outside its basic rationale. . . ." *Wilderness Society v. Morton*, 495 F.2d 1026, 1029 (D.C. Cir. 1974) (en banc), *rev'd on other grounds sub nom. Alyeska Pipeline Service Co. v. Wilderness Society, supra.* To hold that we could charge the college for a common benefit to an undefined public would be to apply in other words the private attorney general theory which the *Alyeska* Court proscribed. And the inapplicability of the common benefit theory to an assessment of attorney's fees against the individual defendants is even more obvious. Thus we conclude that a remand for findings with respect to this theory is not appropriate.

Skehan also urges that on remand he would be able to show that all of the defendants, but in particular, President Nossen, acted in bad faith, vexatiously, wantonly, or for oppressive reasons, states of mind which Skehan contends permit an award of attorney's fees under the American rule. The particular reference to Nossen, a prime mover in his termination but hardly a prime mover in carrying on this litigation, suggests the need for distinguishing between the bad faith which may have led to the termination of employment with bad faith, vexatiousness or oppression in litigating. It is the latter which comprises the predicate for the well-recognized fourth exception to the American rule on fee awards. The fee is awarded in the nature

of costs for vexatiously bringing or maintaining an unfounded action or defense.[7] 6 J. Moore, Federal Practice ¶54.77[2], at 1079 (2d ed. 1974). It can hardly be said that on those issues on which the defendants have thus far prevailed the defense has been maintained in bad faith, vexatiously, wantonly or for oppressive reasons. Nor can we find evidence of oppressiveness in the defendants' response on appeal to those issues on which Skehan has been successful. On the other hand, since we are remanding and we cannot predict the future course of this litigation, we cannot foreclose consideration of the award of attorney's fees as costs based upon any lack of good faith in maintaining the litigation in the future.

Skehan, relying on *Vaughan v. Atkinson,* 365 U.S. 527, 530-31 (1962), urges that there is a fifth exception to the American rule, which allows the recovery of fees as an element of damages for pre-litigation vexation or oppression in resisting a just claim. In *Vaughan v. Atkinson,*

[7] The Judiciary Act of 1789, 1 Stat. 73, gave federal courts discretionary authority to tax in favor of one party and against another expenses occasioned by delay in litigation. Section 22, governing the writ of error in civil actions, provided in part:

> "And every justice or judge signing a citation on any writ of error as aforesaid, shall take good and sufficient security, that the plaintiff in error shall prosecute his writ to effect, and answer all damages and costs if he fail to make his plea good."

1 Stat. 85.

Section 23 provided:

> "[A]nd whereupon such writ of error the Supreme Court or a circuit court shall affirm a judgment or decree, they shall adjudge or decree to the respondent in error just damages for delay, and single or double costs at their discretion."

Id. Cf. The Perserverance, 3 U.S. [3 Dall.] 336 (1797).

a suit in admiralty for maintenance and cure and for injury from the withholding of maintenance and cure when it was due, the seaman could show no injury caused by the withholding of the payments other than the cost of attorney's fees in the suit. The Fourth Circuit, applying the American rule, refused to award fees as an item of compensatory damages.[8] The Supreme Court, with seven Justices participating and two dissenting, held that attorney's fees could be recovered as damages suffered for failure to pay maintenance. Authority for this departure from the American rule was found in *The Appollon,* 22 U.S. [9 Wheat.] 362 (1824), an admiralty suit for the recovery of damages for the illegal seizure of a vessel. Justice Story wrote:

> It is the common course of admiralty, to allow expenses in this nature [cousel fees], either in the shape of damages, or as part of the costs. 22 U.S. [9 Wheat.] at 379.

Vaughan v. Atkinson has frequently been cited in non-admiralty contexts. Since the ringing reaffirmation of the American rule in *Alyeska Pipeline Service Co. v. Wilderness Society, supra,* its authority in non-admiralty contexts is not entirely clear. We can glean something of the Court's attitude perhaps from the reference to the case in *F. D. Rich Co. v. Industrial Co.,* 417 U.S. 116, 129 n. 17 (1974). There the text reads "We have long recognized that attorneys' fees may be awarded to a successful party when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons . . .", and the footnote cites *Vaughan v. Atkinson,* but also three circuit court

[8] Vaughan v. Atkinson, 291 F.2d 813, 815 (4th Cir. 1961).

non-admiralty cases[9] in which attorney's fees were awarded for pre-litigation obduracy or oppression in equitable actions. *Alyeska,* in turn, cites the *F. D. Rich Co.* reference to *Vaughan v. Atkinson* with approvel. 421 U.S. at 259. It would seem, then, that the *Vaughan v. Atkinson* exception to the American rule is not restricted to admiralty cases and survives *Alyeska. See Bond v. Stanton,* 528 F.2d 688 (7th Cir. 1976), *cert. granted,* 44 U.S.L.W. 3685 (U.S. June 1, 1976) (No. 75-1413); *Thonen v. Jenkins,* 517 F.2d 3, 6 (4th Cir. 1975); *Handler v. San Jacinto Junior College,* 519 F.2d 273, 280 (5th Cir. 1975); *Class v. Norton,* 505 F.2d 123, 127 (2d Cir. 1974); *Taylor v. Perini,* 503 F.2d 899, 904 (6th Cir. 1974), *vacated on other grounds,* 421 U.S. 982 (1975); Comment, Court Awarded Attorney's Fees and Equal Access to the Courts, 122 U. Pa. L. Rev. 636, 689 (1974); Note, Attorneys' Fees and the Eleventh Amendment, 88 Harv. L. Rev. 1875, 1882 (1975) (citing *Hall v. Cole,* 415 U.S. 1, 15 (1973)). *Compare Potter v. Gardner,* 30 U.S. [5 Pet.] 718, 725-27 (1831) (Baldwin, J., dissenting). Whether the facts of this case warrant its application against any of the defendants is a matter on which the district court should pass in the first instance.

One issue tendered to the Supreme Court by Skehan's petition for certiorari was whether the Commonwealth may be required to pay attorney's fees as part of an order granting prospective relief for violation of the fourteenth

[9] McEnteggart v. Cataldo, 451 F.2d 1109 (1st Cir. 1971); Bell v. School Bd., 321 F.2d 494 (4th Cir. 1963); Rolax v. Atlantic Coast Line R.R., 186 F.2d 473 (4th Cir. 1951); McEnteggart v. Cataldo, is particularly significant since it involved the award of attorney's fees to a dismissed college teacher suing to obtain a statement of reasons for his dismissal.

amendment.[10] The Court in the *Alyeska Pipeline* case did not purport to decide the question, *see* 421 U.S. at 269-70 n. 44, and found it unnecessary to do so in its summary disposition of Skehan's petition for certiorari.

In our prior opinion we concluded that *Edelman v. Jordan,* 415 U.S. 651 (1974), precluded a private attorney general fee award against the college if under Pennsylvania law it was a state agency for which the Commonwealth claimed sovereign immunity. 501 F.2d at 42. In that opinion we were not dealing with a fee award against the Commonwealth for obduracy in carrying forward the defense of a weak case, an issue which, as we said above, may arise in the future course of this litigation. Although the issue is not free from doubt, it seems likely that since such an award is considered to be an award of costs, it would be governed by the established rule that state sovereign immunity is no bar to an award of costs. *Fairmont Creamery Co. v. Minnesota,* 275 U.S. 70 (1927). A number of courts of appeals have allowed awards of attorney's fees against instrumentalities of the state on this ground. *See, e.g., Thonen v. Jenkins, supra,* 517 F.2d at 7; *Souza v. Travisono,* 512 F.2d 1137 (1st Cir.), *vacated on other grounds,* 423 U.S. 809 (1975); *see also Gates v. Collier,* 522 F.2d 81 (5th Cir. 1975) (en banc) (per curiam), *on remand,* 44 U.S.L.W. 2405 (N.D. Miss. Feb. 3, 1976); *Taylor v. Perini, supra* (Edwards J., dissenting). Since the obduracy ground for a fee award may still arise in this case, we hold that attorney's fees may be awarded as costs against a sovereign otherwise immune, if it pursues

[10] *See* Petitioner's Brief for Certiorari at 2, Skehan v. Board of Trustees of Bloomsburg State College, 421 U.S. 983 (1975); 43 U.S.L.W. 3366 (U.S. Nov. 8, 1974) (No. 74-558).

a bad faith, vexatious, wanton or oppressive course of litigation, but may not be awarded against an immune sovereign as damages because of pre-litigation obduracy on the authority of *Vaughan v. Atkinson, supra.*[11] We call to the district court's attention, however, that the issue of attorney's fee awards against a state is pending on certiorari in *Fitzpatrick v. Bitzer,* 519 F.2d 559 (2d Cir. 1975), *cert. granted,* 44 U.S.L.W. 3358 (U.S. Dec. 16, 1975) (No. 75-251). The opinion in that case, when it is decided, may require a decision at variance with our holding.[12]

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[11] We held in our prior opinion in this case that *Edelman v. Jordan* had tacitly overruled the summary affirmance in Amos v. Sims, 409 U.S. 942 (1972), of a fee award to be paid out of a state treasury. *See* 501 F.2d at 42-43, n. 7; *see also Alyeska Pipeline Service Co. v. Wilderness Soc'y., supra,* 421 U.S. at 270-71, n. 46. The district court award in that case had been predicated upon both the private attorney general theory and the obduracy exception to the American rule. *See* Sims v. Amos, 340 F. Supp. 691, 693-95 (M.D. Ala. 1972) (per curiam). It may therefore be argued that in view of this court's interpretation of *Edelman v. Jordan,* the theory of recovery upon which we remand this case to the district court is now foreclosed. In our previous opinion, however, the only question before us involved the effect of *Edelman v. Jordan* upon the private attorney general theory of recovery of attorney's fees from the state. We had no occasion to consider the impact of *Edelman v. Jordan* upon the aspect of *Amos v. Sims* recurring in this case—whether a fee award may be assessed as costs against a state that has vexatiously prolonged the course of litigation.

[12] *Fitzpatrick* followed a prior Second Circuit decision, Class v. Norton, 505 F.2d 123, 126-27 (2d Cir. 1970), which permitted fee awards against the state. The court held that such an award was not barred by *Edelman v. Jordan* where it was a "necessary results of attempts to gain compliance with a decree which by its terms was prospective in nature" and had but an ancillary effect on the state treasury. *See also Souza v. Travisono, supra.* The

Summarizing, the theory upon which we suggested that the district court could award attorney's fees—the private attorney general theory—has been foreclosed by *Alyeska Pipeline Service Co. v. Wilderness Society, supra,* and the obduracy ground was not previously considered. We therefore remand this aspect of the case to the district court for additional findings on the obduracy issues.

II. *Wood v. Strickland*

Skehan's petition for certiorari also tendered to the Supreme Court the question whether we applied a proper standard in determining that the individual defendants were immune from civil damage actions because of official immunity.[13] The mandate on remand directs us to reconsider that determination in light of *Wood v. Strickland, supra.* Upon such consideration we conclude that *Wood v. Strickland* significantly modified the law of immunity upon which we relied in affirming the district court, and that a remand for additional findings of fact is now required.

In our prior opinion we assumed that the Supreme Court had thus far interpreted 42 U.S.C. §1983 as having left intact the existing common law respecting immunity from damage claims for actions arising out of the performance of duty of legislators, *Tenny v. Brandhove,* 341 U.S. 367 (1951), judges, *Pierson v. Ray,* 386 U.S. 547, 554 (1967), and government officials. *See Bauers v. Heisel,*

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court did not attempt to justify the fee award as an element of costs, so it is conceivable that the Supreme Court will decide the case on narrower grounds than are encompassed by this proceeding.

[13] Petitioner's Brief for certiorari, *supra,* note 10, at 2; 43 U.S.L.W. 3366.

361 F.2d 581 (3d Cir. 1966) (en banc); *Fidtler v. Rundle,* 497 F.2d 794, 797-98 (3d Cir. 1974). We also assumed that federal law determines the scope of any such immunity when the defendant is charged with a federal statutory or constitutional wrong. *Fidtler v. Rundle, supra,* at 798-800. We recognized that not all government officials are at common law covered by official immunity. We held that whether or not a particular official enjoyed immunity for his conduct depended upon whether the action complained of was performed in the discharge of a discretionary governmental function. We also held that all defendants' actions of which Skehan complained occurred in the exercise of discretionary governmental functions. It was our view that if the governmental officials performing discretionary government duties acted within the scope of their official responsibilities, they were immune from damage actions although they were charged with having acted mistakenly or even maliciously. The theory justifying immunity from damage claims, we thought, was that the public interest in the unfettered exercise of discretionary duties such as legislating, adjudicating, rule-making or budgeting was so paramount that it should be performed free of the fear that either the motivation of the responsible officials or the correctness of their decisions could later be called into question in a suit for damages.

We recognized that not all government officials enjoyed such an unqualified immunity, and that some governmental officials were immune when performing certain duties but not immune when performing others. In this case the acts complained of resulted in Skehan's discharge during the term of his contract. Each defendant acted within the scope of his official statutory authority, and the decision to terminate Skehan's employment was in essence ad-

judicatory. In making the adjudication the defendants committed a procedural legal error of constitutional dimensions. But we believed that neither that error nor their motivation could be called into question in damage actions because governmental officials entrusted with adjudicatory responsibilities enjoyed, when discharging such duties, and unqualified immunity. *See Spalding v. Vilas,* 161 U.S. 483 (1896); *Barr v. Matteo,* 360 U.S. 564 (1959).

We did not believe that *Scheuer v. Rhodes,* 416 U.S. 232 (1974), had overruled what we thought was a settled principle that the immunity of some governmental officials, and specifically nonjudicial government officials performing adjudicatory functions, was unqualified. It was our impression that *Scheuer v. Rhodes* recognized a qualified immunity for governmental officials generally. Even governmental officials not performing discretionary duties such as legislating, adjudicating, rule-making or budgeting were immune if they acted within the scope of their official responsibilities in good faith and with probable cause. We perceived the purpose of the remand in *Scheuer v. Rhodes* to be two-fold. First, the Court needed a record to determine the nature of the duties being performed by each of the defendants. Second, if those duties were not such as would cloak a given defendant with an unqualified immunity, the Court needed a record to determine whether the defendant acted within the scope of his official responsibility in good faith and with probable cause.

Wood v. Strickland, supra, demonstrates that we erred in assuming that there still existed an unqualified, common law immunity covering nonjudicial state government officials performing adjudicatory functions. The question before the Court was the immunity of school board members

for a disciplinary suspension. The defendants had the official responsibility for making the adjudication, and they made a procedural error of constitutional dimensions. The Court held:

> "[I]n the specific context of school discipline, we hold that a school board member is not immune from liability for damages under §1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student. 420 U.S. at 322.

Functionally, the school board members adjudicating a student discharge and the state college officials adjudicating a faculty termination are identically situated. In the light of *Wood v. Strickland*, supra, we must now recognize that what we thought was an unqualified privilege is in truth something less broad. While we can determine on the present record that the defendants were performing nonjudicial adjudicatory functions within the scope of their official responsibilities, we cannot determine that they met the *Wood v. Strickland* test.

The defendants urge that the district court finding, referred to in our prior opinion, 501 F.2d at 43 n.8, that the constitutional deprivation was technical in nature and not the product of bad faith, suffices to establish a qualified immunity. We reject this contention because at best the finding would satisfy only one of the two conditions of immunity established by *Wood v. Strickland*. A nonjudicial adjudicating official must act without malice. But the inquiry does not end there. He can be held liable for dam-

ages if he knew or reasonably should have known that the action he took would violate the constitutional rights of the party affected. There was no finding with respect to the defendants' knowledge or the reasonableness of their belief in the legal necessity for a pre-termination hearing. Moreover, in our prior review, since we assumed that we were dealing with an unqualified privilege, we had no occasion to pass upon the strength of the evidence supporting the district court's finding of good faith. Finally, since the Supreme Court has announced what we consider to be a departure from the settled prior law on governmental immunity in this circuit, we deem it appropriate that the district court be given an opportunity to reconsider both qualifications to the defendants' immunity.

Several questions not addressed by the Supreme Court in *Wood v. Strickland* will of necessity arise on remand in this case. These include which side has the burden of going forward with evidence and which side has the burden of proof on the two qualifications to the defendants' immunity. We find guidance on these issues in the Court's opinion in *O'Connor v. Donaldson*, 422 U.S. 563 (1975), *vacating and remanding* 493 F.2d 507 (5th Cir. 1974). There the Court tacitly approved in part a charge submitting to the jury the issue of a governmental official's immunity.[14] The Court held that the jury was improperly instructed with respect to petitioner O'Connor's reasonable belief in the constitutionality of his actions,[15] but implied that the malice instruction was correct. The charge on

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[14] This charge applied both to the common law defense of good faith raised by O'Connor and to the question of official immunity. *See* 493 F.2d at 527, 530 & n. 57.

[15] This error induced the Court to vacate the judgment and remand for reconsideration in light of *Wood v. Strickland*.

malice is set forth in full in Judge Wisdom's opinion for the Fifth Circuit, 493 F.2d at 527. The issue was submitted to the jury not as an element of the plaintiff's case, but as a defense which O'Connor, the official, had by a preponderance of the evidence the burden of sustaining. Although *O'Connor v. Donaldson* is not definitive, it suggests that the qualifications to immunity announced in *Wood v. Strickland* are matters of defense. *See* 422 U.S. at 576-77; *Glasson v. City of Louisville,* 518 F.2d 899 (6th Cir.), *cert. denied,* 423 U.S. 930 (1975); *Bryan v. Jones,* 44 U.S.L.W. 2521 (5th Cir. Apr. 30, 1976) (en banc).

Following the remand in *Bivens v. Six Unknown Named Agents,* 403 U.S. 388 (1971), in which the Court did not reach the issue of official immunity, the Second Circuit held that federal police officers were not immune from suit, but had a defense, on which they would have the burden of proof, that they acted with probable cause, or in good faith and with a reasonable belief in the legality of their actions. *See* 456 F.2d 1339, 1347-48 (2d Cir. 1972). In *Safeguard Mutual Insurance Co. v. Miller,* 472 F.2d 732 (3d Cir. 1973), this court adopted the same approach, holding that since good faith was a matter of defense it could not be determined on a Rule 12(b) (6) motion. *Accord, Fidtler v. Rundle,* 497 F.2d 794 (3d Cir. 1974). *Wood v. Strickland* and *O'Connor v. Donaldson* appear not to have made any change in the law in this respect. We therefore hold that in §1983 actions the burden is on the defendant official claiming official immunity to come forward and to convince the trier of fact by a preponderance of the evidence that, under the standards of *Wood v. Strickland,* official immunity should attach. On remand the district court must determine whether the defendants met their burden of establishing (1) that they

did not know and reasonably need not have known that depriving Skehan of a pretermination hearing violated due process, and (2) that they acted without malicious intention to deprive him of his constitutional rights or cause him to suffer other injury. Whether those determinations can be made on the present record, or can be made in a motion for summary judgment under Rule 56, Fed. R. Civ. P., are questions we leave to the district court in the first instance. *See Economou v. United States Department of Agriculture,* No. 75-6050, at 3410 (2d Cir. Apr. 23, 1976).

While we can give guidance to the district court as to where various burdens lie on the *Wood v. Strickland* qualifications, we are less confident of our ability to suggest by what criteria the reasonableness of the several defendants' lack of knowledge of due process requirements should be measured. The district court will be required to inquire into the status and responsibility of each individual defendant and to determine whether, for example, a trustee should be held responsible for the same level of knowledge of constitutional rights as a college president or a commissioner of education. The determination may turn on the relative availability to each defendant of counsel, as well as the relative certainty of the legal issue, a criterion to which the *Wood v. Strickland* Court expressly adverted. 420 U.S. at 322. The federal courts will be entering largely unchartered waters here, for the pre-existing rule of unqualified official immunity meant that very little if any case law was developed with respect to standards of liability for negligent mistakes of law by persons making nonjudicial adjudications. *Cf. Paton v. LaPrade,* 524 F.2d 862, 872-73 (3d Cir. 1975).

O'Connor v. Donaldson describes *Wood v. Strickland* as a "decision on the scope of the qualified immunity pos-

sessed by state officials . . . ." 422 U.S. at 577. Since that decision, however, the Court clarified the picture by its holding in *Imbler v. Pachtman*, 44 U.S.L.W. 4250 (U.S. Mar. 2, 1976), that the common law unqualified immunity of judicial officers remains undisturbed. Thus *Bauers v. Heisel*, 361 F.2d 581 (3d Cir. 1966) (en banc), which overruled *Picking v. Pennsylvania R.R.*, 151 F.2d 240 (3d Cir. 1945), still governs with respect to judicial officers. But non-judicial, executive branch state officials can be sued for damages and must, if a violation of constitutional rights is found, defend on the grounds announced in *Wood v. Strickland*.[16]

III. *The Status of Bloomsburg State College*

In our earlier opinion we directed the district court on remand to determine the governmental status of Bloomsburg State College. 501 F.2d at 43, 45. Between the date of argument in this court and the date our opinion was filed, the Pennsylvania Commonwealth Court decided *Brungard v. Hartman*, 12 Pa. Commw. 477, 315 A.2d 913 (1974), which holds that state colleges such as Bloomsburg State College are agencies of the Commonwealth for which it claims sovereign immunity. That case was not called to our attention before our opinion was filed. It appears dispositive of the sovereign immunity issue. Thus it is clear in a case of this type that a back pay award cannot be made out of the college treasury, and that an award of attorney's fees against the college can only be made as costs for obduracy in this litigation.

[16] Whether an executive branch official enjoys judicial immunity will of course be determined by the nature of his functions, and not by the label that is attached to them.

IV. *Conclusion*

Our prior judgment will be vacated. The judgment of the district court will be vacated and the case will be remanded for findings of fact:

1. As to the nature of the interest created under Pennsylvania law by article 5(e) of the Statement of Policy for Continuous Employment and Academic Freedom at Bloomsburg State College:[17]

2. As to whether the decision not to renew Skehan's contract after 1970-71 was based on his stands on campus issues with which the administration disagreed.

If Skehan's only contract right expired by its terms at the end of the 1970-71 academic year, and there was no first amendment violation, a back pay award against the individual defendants, covering the 1970-71 period, must be considered. The court should then make findings of fact with respect to the immunity of each defendant in conformance with this opinion. If either the article 5(e) claim or the first amendment claim should be decided in Skehan's favor, the court should consider the award of back pay to date against the individual defendants, and also prospective reinstatement (as to which there is no immunity problem), at least until appropriate college termination procedures have taken place. We also call the district court's attention to the Supreme Court's recent decision in *Bishop v. Wood*, 44 U.S.L.W. 4820 (U.S. June 10, 1976), a decision considering or perhaps reconsidering the scope of the protection afforded public employment by the due process clause. We leave it to the district court in

[17] *See* 501 F.2d at 45.

the first instance to decide whether or to what extent that decision bears upon this litigation. We also instruct the district court to consider whether an award of attorney's fees would be appropriate against any of the individual defendants for bad faith, vexatious, wanton or oppressive conduct both prior to and during the course of this litigation, and against the college for such conduct subsequent to the commencement of the litigation.

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 73-1613

Dr. Joseph T. Skehan,

Appellant

vs.

Board of Trustees of Bloomsburg State College and Dr. Robert Nossen and Dr. Charles Carlson and John Pittenger, Superintendent of Education, Commonwealth of Pennsylvania and Bloomsburg State College
(D. C. Civil Action No. 72-644)

Present: Seitz, *Chief Judge,* Biggs, Van Dusen, Aldisert, Adams, Gibbons, Rosenn, Hunter, Weis and Garth, *Circuit Judges*

JUDGMENT ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel and reargued by counsel after remand from the Supreme Court of the United States.

On consideration whereof, it is now here ordered and adjudged by this Court that the prior judgment of this Court, filed May 3, 1974, be, and the same is hereby vacated; and it is further ordered that the judgment of the said District Court filed May 11, 1973, be, and the same is hereby vacated and the case is remanded for further proceedings in accordance with the opinion of this Court.

Attest:
Thomas P. [Illegible]
Clerk

June 21, 1976

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

May 27, 1975

Bruce J. Terris, Esq.
1908 Sunderland Place, N.W.
Washington, D.C. 20036

Re: Skehan v. Board of Trustees of Bloomsburg State College, et al., 74-558

Dear Sir:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Third Circuit for further consideration in light of *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. — (1975), and *Wood v. Strickland*, 420 U.S. 308 (1975). Mr. Justice Douglas took no part in the consideration or decision of this case.

Encl.—cc opins.
mentioned.

Very truly yours,
Michael Rodak, Jr., *Clerk*
By
Helen Taylor
Helen Taylor (Mrs.)
Assistant Clerk

J. Justin Blewitt, Jr., Esq.
Deputy Attorney General of Pennsylvania
Dept. of Justice
Capitol Annex Bldg.
Harrisburg, Pa. 17120

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 73-1613

Dr. Joseph T. Skehan,

Appellant,

v.

Board of Trustees of Bloomsburg State College and Dr. Robert Nossen and Dr. Charles Carlson and John Pittinger, Superintendent of Education, Commonwealth of Pennsylvania and Bloomsburg State College,

Appellees.

(D.C. Civil Action No. 72-644)

On Appeal from the United States District Court for the Middle District of Pennsylvania

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Argued January 25, 1974

Before Biggs, Gibbons and Garth, *Circuit Judges*

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Attorney for Appellees

OPINION OF THE COURT

(Filed May 3, 1974)

[501 F.2d 31 (1974)]

Gibbons, *Circuit Judge*

Plaintiff appellant, Joseph Skehan, a doctor of economics, seeks redress for his midcontract dismissal without a hearing as a nontenured college professor at Bloomsburg State College. The defendant-appellees are Bloomsburg State College, its Board of Trustees, Dr. Robert Nossen, its President at the time of Skehan's dismissal, Dr. Charles Carlson, its current acting President, and John Pittinger, Superintendent of Education of the Commonwealth of Pennsylvania. Although the College is joined as a defendant, and has a Board of Trustees responsible for its management, Pa. Stat. Ann. tit. 71, §62, tit. 24, §20-

2008.2, it is not a separately chartered corporation, as in the case of many universities, but a subdivision of the Commonwealth Department of Education, Pa. Stat. Ann. tit. 24, §§20-2002(7), 20-2003.1. All the individual defendants are state officers. Skehan was employed as Associate Professor of Economics in January 1969 under the contract extending through the academic year 1969-70. In May of 1970 he received a letter from Nossen offering him a contract for the 1970-71 school year, but indicating that he would be required to acknowledge in writing notice that this would be a terminal year contract. He accepted the offer of employment for the 1970-71 academic year, but protested that the nonrenewal decision had been made without affording him the procedures due him before a nonrenewal decision could be made. In that protest he invoked article 5(e) of the Statement of Policy for Continuous Employment and Academic Freedom at Bloomsburg State College, which provides:

> "If a faculty member's service to the College is to be terminated during the first two years of the probationary [pretenure] period, the President of the College will feel free to explain to the faculty member the basis of the decision, but he shall not be required to do so except in a situation where there is an allegation of infringement of academic freedom. If a faculty member of professional rank, on probationary employment, alleges that a decision not to reappoint him has been caused by considerations violative of academic freedom, his allegations shall be given preliminary consideration by the Committee on Professional Affairs, and the procedures concerning notification, appeal, hearing, and defense outlined in #9 of this document will be followed."

Article #9 outlines the notice, hearing and appeal procedures applicable to the dismissal of tenured faculty members. Thus Skehan's position in May 1970 was that the nonrenewal decision reflected in the terminal year notice was caused by considerations violative of academic freedom and that he was entitled to the hearing procedures referred to in article #9. Nossen replied on June 1, 1970:

> "I cannot accept your letter of May 29, 1970 as an acceptance of your position for the coming academic year. . . .
>
> If you do not sign the offer of reappointment sent you [with the acknowledgment of notice that it was a terminal year contract], you may consider yourself terminated for the coming academic year. . . .
>
> This is my final letter on this matter."

Skehan protested to the Board of Trustees that Nossen was violating the Statement of Policy for Continuous Employment and Academic Freedom. On June 15, 1970 Nossen wrote Skehan:

> "Your appeal to the Board of Trustees, bypassing this office and other avenues of College governance, was reviewed at the Board of Trustees meeting on June 12, 1970. The Board has requested that I advise you as follows:
>
> * * *
>
> The Board restates its firm and inviolable position of nonrenewal past the 1970-71 academic year. In doing so, it reaffirms its position that the offer to you reflects simply its wish to conform fully with accepted notice procedures. The offer is neither a statement of confidence in you nor a wish that you remain

during this period. On the contrary, the Board has expressed every hope that you will find it both personally and professionally advantageous to offer your resignation at this time.

* * *

The College has prepared a contract form which is applicable to all persons offered appointment. Your refusal, to this point, to return the contract in accord with their prescribed procedures continues to indicate to them your disregard for College procedures. Nevertheless, in view of the original intention to provide due notice, they will accept the alternative letter as an indication of your acceptance of the 1970-1971 appointment as terminal.

I must, however, in all honesty and fairness, join with the Board of Trustees in the hope that you will reject the appointment."

Thus the College administration in effect rejected Skehan's request for an article 5(e) hearing on the reasons for the terminal year decision, but rehired him for the academic year 1970-71. Skehan entered into the performance of his academic duties in September. How he performed them is a matter of dispute between him and the defendants.[1] On October 9, 1970 Nossen wrote Skehan:

[1] It is common ground that there was a dispute between Skehan and other members of the economics department and the College administration over whether the department or the administration controlled class scheduling. Skehan contends this dispute provided a subterfuge for his termination because of Nossen's hostility over his previous exercise of first amendment rights. The defendants contend Skehan's intransigence in the scheduling dispute caused intolerable disruption.

"You have continued, after repeated warnings from your Chairman, your Dean, the Academic Vice President, and from this office to fail to fulfill your classroom obligations as assigned, according to the procedures in effect at this college. Further, you have flagrantly, wilfully, and maliciously disrupted the instructional program. Upon the recommendation, therefore, of appropriate administrative officers, I am, effective immediately, relieving you of all classroom responsibilities, pending a final hearing.

I hardly need remind you that you are, during this current year, on terminal appointment. You were, at the time that appointment was offered, advised that your previous disruptive activities made your presence on this campus unwelcome, and the hope was expressed that you would not accept. You chose to complete this year, and at the same time you were aware that the offer went well beyond the minimum time necessary for notice, according to the policies of the Trustees; this was done in consideration of the difficulty you would probably have in finding an appointment in mid year. Despite this, you have failed to cooperate, to fulfill your responsibilities as a classroom instructor, and you have made it impossible for others to meet their assigned responsibilities. Your conduct, therefore, has been reprehensible, unbecoming a member of the profession, and inimical to the welfare of this college.

Should you violate the provisions of this notice and attempt to disrupt any authorized lecture or classroom of this college, full and immediate action will be taken. In the interim, I expect to receive from you, within five days, a full and a complete accountability

> of your actions on this campus since the start of this semester. Your salary will be continued until a final determination is made."

Although this letter demanded from Skehan within five days, "a complete accountability of your actions on this campus since the start of this semester," it was not received by him until October 12, 1970. On October 14 Skehan replied that the suspension had not been preceded by the procedures called for in the College's policy. On October 19, 1970 Nossen wrote Skehan:

> "Once again you have willfully and flagrantly failed to respond to my directive; this time an accountability requested on October 9, 1970. You were given five (5) days in which to make your response detailing your professional actions since the start of this semester.
>
> You have failed to comply and I have no alternative but to remove you from the payroll effective October 17, 1970 subject to final approval by the Board of Trustees."

Skehan promptly wrote to the Board requesting a hearing. On October 24, 1970 Nossen wrote Skehan:

> "The Board of Trustees, at its regularly scheduled meeting on October 23, 1970, confirmed prior dismissal action taken by this office; you are, therefore, fully and finally terminated at this College effective October 17, 1970."

Skehan went off the College payroll as of October 17, 1970. On December 1, 1970 the Committee on Academic Affairs convened to hold a hearing concerning Skehan's dismissal. He appeared but declined to participate. On the basis of correspondence and records submitted by the

administration the Committee approved the dismissal action.

The defendants do not now dispute that Skehan had a contract of employment for the 1970-71 academic year. Skehan contends, but the defendants dispute, that he had a contract right to a hearing, pursuant to article 5 (e), with respect to the reasons for the terminal year decision, which had the effect of depriving him of the opportunity for tenured faculty status after three years. The parties agree that the contract for the academic year 1970-71 was such as under Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972), gave Skehan a property interest which could not be terminated without a due process hearing. The defendants contend, but Skehan disputes, that the December 1, 1970 meeting satisfied the requirements of Perry v. Sindermann, *supra*. The report of the hearing committee on the December 1, 1970 hearing discloses that it dealt only with the October 17, 1970 dismissal, and not with the May 1970 demand for an article 5 (e) hearing on the reasons for the terminal year decision. Finally Skehan contends, but the defendants dispute, that both the terminal year decision and his discharge were motivated by the administration's dislike of his exercise of first amendment rights. Violations of these rights, Skehan contends, entitle him to relief despite the limitation of any property interest in his contract. *See* Perry v. Sindermann, *supra* at 598; Keyishian v. Board of Regents, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967); Shelton v. Tucker, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960).

Skehan filed his complaint in the district Court in August 1972, seeking preliminary and permanent injunctive relief of reinstatement and back pay, declaratory relief

that his dismissal violated the Constitution, punitive damages, and attorneys fees. A preliminary injunction was denied on January 31, 1973. Skehan v. Board of Trustees of Bloomsburg College, 353 F. Supp. 542 (M.D. Pa. 1973). Subsequently, the parties stipulated that a final hearing could be held on the record developed at the hearing on the preliminary injunction. The district court filed its opinion on May 9, 1973, 358 F. Supp. 430, and a final judgment "that the Plaintiff recover of the Defendants the sum of one dollar ($1.00), together with costs." Timely motions to amend the judgment to award more than nominal damages and to assess counsel fees were denied. This appeal followed.

The District court found:

(1) that Skehan had a contract of employment for the 1970-71 academic year which was a property interest within the meaning of Perry v. Sindermann, *supra*, and Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972);

(2) that the December 1, 1970 hearing before the Committee on Academic Affairs, held a month and a half after termination, did not fulfill the constitutional due process requirements for the termination of his property right in the 1970-71 contract;

(3) that Skehan was discharged because of his refusal to follow directives of the administration with respect to scheduling disputes, and not for the prior exercise of his first amendment rights.

The district court made no finding:

(1) as to whether Skehan had a contractual right to an article 5(e) hearing to determine the reason for the terminal year decision; or

(2) as to whether the terminal year decision was made in retaliation for his exercise of first amendment rights.

In considering the remedy for the due process violation which it found, the district court concluded that it would not be appropriate to order reinstatement and back pay, either to the end of the 1970-71 academic year or to the date of a hearing. The Court reasoned:

> "While Plaintiff was deprived of his constitutional right to a hearing prior to dismissal, the deprivation was technical in nature. By such a classification I do not wish to demean a state employee's right to procedural due process. However, the circumstances surrounding this particular case indicate that had Plaintiff been afforded a hearing prior to his discharge, in all probability the outcome would have been the same. Plaintiff's discharge was based upon facts rationally determined and for reasons unrelated to Plaintiff's exercise of constitutional rights. The Plaintiff has not proven any actual damages arising from Defendant's failure to give him a hearing. However, nominal damages are proven by proof of a deprivation of a right to which the Plaintiff is entitled. . . ." 358 F. Supp. at 436.

We reverse and remand for further proceedings.

I. GOVERNING LEGAL PRINCIPLES

(1) In Board of Regents v. Roth, *supra,* and Perry v. Sindermann, *supra,* the Supreme Court considered the various Constitutional rights which might be affected by the dismissal of a college teacher, and the source of those rights. It recognized a dichotomy between employment

rights of property based upon a contract between the institution and the teacher, the source of which is the state law of contracts, and rights of liberty based upon provisions of the federal constitution such as the first amendment. As to property rights the appropriate analysis is to determine, under applicable state law, the nature and extent of the contract right and, if the contract right has been terminated other than by expiration of its term, to consider whether the method of termination comported with fourteenth amendment procedural due process. If a procedural due process violation has occurred, the court proceeds to fashion a remedy. With rights of liberty, such as the right of a faculty member to be free from disability imposed for engaging in speech protected by the first amendment, the analysis starts with an inquiry into the substantive reasons for whatever action is complained of. If it is found that either termination or nonrenewal was because of the exercise of protected speech (as an example), the procedural due process of the decision is irrelevant because the substantive decision is illegal as a matter of federal constitutional law. If such a substantive violation of a right of liberty has occurred, the court proceeds to fashion a remedy which, depending on the circumstances, may be the same as or different from the remedy for a procedural due process violation in the property context.

II. THE PROPERTY PROCEDURAL DUE PROCESS CLAIM

(2) As we pointed out above, the defendants do not dispute that Skehan's contract for the academic year 1970-71 gave him such a state law property interest as required procedural due process for termination. They urge, however, that the district court erred in concluding that the December 1, 1970 hearing did not suffice. If we were to accept that position, there would be no occasion to reach Skehan's claim that the district court remedy was inadequate. But there is a substantial difference in the position of the parties once termination has actually occurred. First, the employee, cut off from the payroll, is greatly disadvantaged in his ability to pursue the hearing remedy. He may be forced by the necessity for survival to seek other employment which will foreclose the pursuit of reinstatement. Second, the institution will have made substitute teaching arrangements, thus introducing into the hearing consideration of the interests of other faculty members. This inevitability will increase whatever tendency may already exist for the hearing officials to defer to the administration's decision. We agree with the district court, therefore, that a hearing after the fact is not the due process equivalent of the pretermination hearing required by Perry v. Sindermann, *supra*. *See* 358 F. Supp. at 434-435. The termination of Skehan's 1970-71 contract violated procedural due process.

(3) Skehan presented another contractual claim upon which the district court made no finding—that under article 5 (e) he was entitled to a hearing on the reasons for the decision to make the 1970-71 contract his terminal year. The court did make a finding that the October 17, 1970 termination was not the result of Skehan's earlier constitutionally protected speech.[2] This finding does not dispose of the claim that the terminal year decision was made for reasons prohibited by principles of academic freedom. Within the meaning of the Statement of Policy for

[2] *See* page 39 [39a] *infra*.

Continuous Employment and Academic Freedom, academic freedom may have a meaning broader than, the equivalent of, or narrower than, the protection afforded by the first amendment. That meaning must be determined under Pennsylvania law. It must also be determined whether, as a matter of interpretation, article 5(e) confers a contractual right or is solely a matter of administrative grace, or is a noncontractual administrative procedure designed to avoid the possibility of violation of the first amendment. Certainly for tenured faculty the Statement of Policy for Continuous Employment and Academic Freedom of Bloomsburg State College appears to confer contract rights with respect to the hearing procedures outlined in article 9. The cross-reference from article 5(e) to article 9, while ambiguous, could well support a finding that even nontenured faculty members have a contractual right to have the renewal decision made without the taint of considerations violative of academic freedom, whatever that term means. If article 5(e) does grant a contract right, Skehan has been deprived of it since the October 17, 1970 termination took place before any article 5(e) hearing was held, and the December 1, 1970 hearing was not addressed to the article 5(e) issue. In the absence of district court findings on the scope of article 5(e) under Pennsylvania law we must, as did the Supreme Court in Perry v. Sindermann, *supra* at 599-603, remand. If the district court finds that article 5(e) gave Skehan a contractual interest of some kind, an appropriate remedy for its breach must be fashioned.

III. THE LIBERTY-FIRST AMENDMENT CLAIM

(4, 5) It is clear that nonrenewal of a nontenured public school teacher's one-year contract, or midyear ter-

mination of that contract, may not be predicated even in part on his exercise of first amendment rights. Perry v. Sindermann, *supra* at 596-598; Simard v. Board of Education, 473 F.2d 988 (2d Cir. 1973). It is also clear that contract rights aside, the allegation that nonrenewal or midyear termination was based on the teacher's exercise of first amendment rights does not give him a right to a hearing by the institution. Rather, such an allegation of a substantive violation of federal constitutional rights is heard and determined by the court in the first instance. *See* Perry v. Sindermann, *supra* at 599 n. 5; Clark v. Holmes, 474 F.2d 928, 932 n. 4 (7th Cir. 1972), cert. denied, 411 U.S. 972, 93 S.Ct. 2148, 36 L.Ed.2d 695 (1973). The district court found that Skehan had not proven by a preponderance of the evidence his allegation that

> "... he was discharged ... because of his stands on campus issues which were contrary to the administration's positions, in violation of his First and Fourteenth Amendment rights to free speech. ... On the contrary, I find that Plaintiff was discharged because of his refusal to follow administrative directives relating to the schedule of classes in the Fall of 1970." 358 F. Supp. at 434.

Skehan contends this finding is clearly erroneous. But while there is ample evidence which would have supported a contrary finding,[3] there is evidence supporting the district court finding[4]. We cannot say that it is clearly er-

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[3] Skehan points to his activist position on the Vietnam War, the administration's displeasure with his extracurricular activities, the trivial nature of the scheduling dispute, and Nossen's intemperate utterances toward him.

[4] The district court points out, for example, that there is no evidence suggesting that his views on Vietnam differed from those

roneous and we cannot substitute our evaluation of the evidence for that of the district court. Thus whatever rights Skehan has with respect to the October 17, 1970 discharge depend upon the termination of his contract without procedural due process.

(6) The terminal year decision, however, presents a separate issue. The district court finding that the October 17, 1970 termination was caused by the scheduling incident rather than by Skehan's prior stands on campus issues does not dispose of his claim that the terminal year decision, made several months before the scheduling dispute arose, was similarly motivated. On that issue the district court made no finding. If it were to find that the decision not to renew his contract was based on stands on campus issues with which the administration disagreed, the nonrenewal decision would be substantively defective under the first amendment and the court would have to fashion an appropriate remedy.

IV. THE DISTRICT COURT'S REMEDY

(7) The district court rejected Skehan's claim for reinstatement and back pay, and awarded nominal damages for the property-procedural due process violation which it found. Since we have already determined that additional findings are required with respect to the article 5(e) contract claim and the first amendment claim on the terminal year decision, the district court obviously will have to reconsider the remedy problem with respect to those claims. Even with regard to the termination claim,

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of the administration, or that the administration was even aware of the extracurricular activities. 358 Supp. at 432 n. 1. Certainly there was a scheduling dispute.

however, the district court's award of nominal damages was improper. The court reasoned that "had Plaintiff been afforded a hearing prior to his discharge, in all probability the outcome would have been the same." 358 F.Supp. at 436. This conclusion was thought to follow from the court's finding on the liberty-first amendment claim, that the termination resulted from the scheduling dispute. But while it was proper for the court to consider that claim in the first instance, it was not proper to substitute the finding it made for the in-house hearing which the institution should have afforded prior to terminating the 1970-71 contract. Such a retrospective substitution of the district court's judgment for that of the administrative hearing officers seriously undermines the hearing requirement. A district court cannot exercise the discretion which is vested in an administrative hearing board, nor can it bring to the dispute the same expert knowledge of the academic environment which should enlighten the deliberations of an academic hearing agency. A board of his academic peers might regard Skehan's scheduling imbroglio as far more trivial than would a district judge. A board of his academic peers might say he is guilty of misconduct, but he should not be fired for that kind of misconduct. The district judge could not exercise such discretion. Furthermore, if we countenance the practice of making findings which the institution should have made, a substantial incentive toward affording procedural due process prior to contract termination will be removed. The result will be to place considerable unreviewable discretion in the hands of the administrators by permitting discriminatory application of the availability of pretermination hearings. Those discriminated against will be forced to the expense, inconvenience and delay of a lawsuit to get what remains of

the due process hearing which should have been provided by the state at the administrative level in the first instance. If the due process protection of contract rights mandated by Board of Regents v. Roth, *supra*, and Perry v. Sindermann, *supra*, is to be meaningful, the sanction for deprivation of that protection must be something more than was awarded in this case. *See, e.g.*, Greene v. United States, 376 U.S. 149, 84 S.Ct. 615, 11 L.Ed.2d 576 (1964); Silver v. New York Stock Exchange, 373 U.S. 341, 365-366 n. 18, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963); Vitarelli v. Seaton, 359 U.S. 535, 545-546, 79 S.Ct. 968, 3 L.Ed.2d 1012 (1959); Service v. Dulles, 354 U.S. 363, 77 S.Ct. 1152, 1 L.Ed.2d 1403 (1957).

V. THE APPROPRIATE REMEDY

Skehan seeks what has sometimes been characterized as the equitable remedy of reinstatement with back pay. The reinstatement remedy has been awarded frequently for terminations unlawful for procedural defects, *see, e.g.*, Vitarelli v. Seaton, *supra;* McNeill v. Butz, 480 F.2d 314 (4th Cir. 1973); Cooley v. Board of Education, 453 F.2d 282 (8th Cir. 1972); Olson v. Regents of University of Minnesota, 301 F. Supp. 1356 (D. Minn. 1969); Lucia v. Duggan, 303 F. Supp. 112 (D. Mass. 1969), or substantive defects, *see, e.g.*, Stolberg v. Members of the Board of Trustees, 474 F.2d 485 (2d Cir. 1973); Rauls v. Baker County, Georgia, Board of Education, 445 F.2d 825 (5th Cir. 1971). Application of that remedy is complicated in this case by the fact that the 1970-71 contract year had already expired by the time the suit started, by the absence of a finding with respect to the article 5(e) claim which might have extended Skehan's contract rights past June of 1971, and by the absence of a finding on the

claim that nonrenewal was for reasons prohibited by the first amendment. But assuming no more than the due process violation which the district court found, back pay from October 17, 1970 to the end of the contract year would seem appropriate. Skehan also seeks attorneys fees. We must first determine, however, from which of the defendants these remedies, or any other retrospective remedies the district court may deem appropriate, may be obtained.

A. *The College*

(8-11) Bloomsburg State College is named as a defendant. The Attorney General of the Commonwealth appeared for it and all other defendants, filing a common answer for all. The status of the College in the governmental structure of the Commonwealth is somewhat ambiguous. We noted a similar ambiguity in Braden v. University of Pittsburgh, 477 F.2d 1, 6-7 (3d Cir. 1973) with respect to the status of the University of Pittsburgh, which, like Bloomsburg State College, is a part of the Commonwealth system of higher education. But unlike the University of Pittsburgh, Bloomsburg State College apparently has no separate corporate existence. *Compare* Pa. Stat. Ann. tit. 24, §§20-2002(7), 20-2003, 20-2003.1, *with* University of Pittsburgh—Commonwealth Act, Pa. Stat. Ann. tit. 24, §§2510-201 to 2510-211. In Ayala v. Philadelphia Board of Public Education, 453 Pa. 584, 305 A.2d 877 (1973), decided after our opinion in *Braden*, the Supreme Court of Pennsylvania abolished governmental immunity for local government units—in that case a school board. That holding would seem to apply to separately chartered educational institutions such as the University of Pittsburgh carrying out the governmental function of public higher education. And if under Pennsylvania law Bloomsburg

State College is a subsidiary governmental unit, it too, is amenable to suit. Thus there would be no state sovereign immunity problem with respect to back pay award assuming, as we do, subject matter jurisdiction to make such an award.[5] If under Pennsylvania law Bloomsburg State College is in effect merely an agency of the Commonwealth rather than a subsidiary governmental unit, the *Ayala* case does not apply, for in Brown v. Commonwealth of Pennsylvania, 453 Pa. 566, 305 A.2d 868 (1973) the Supreme Court of Pennsylvania made clear that the Commonwealth still claimed immunity. *See also* Pa. Stat. Ann. tit. 17, §211.401. The district court did not decide into which category Pennsylvania would fit Bloomsburg State College. Assuming that it would fall within *Brown* rather than *Ayala,* Skehan urges that the Commonwealth has, by not pleading sovereign immunity in the district court, waived that defense. It is well established that the defense of sovereign immunity from suit in a federal court may be waived. *E.g.*, Missouri v. Fiske, 290 U.S. 18, 24, 54 S.Ct. 18, 78 L.Ed. 145 (1933). A general appearance in litigation in a federal court may be such a waiver. Clark v. Barnard, 108 U.S. 436, 447-448, 2 S.Ct. 878, 27 L.Ed. 780 (1883). But while the Attorney General did not plead sovereign immunity on behalf of the College in the district court he vigorously asserted it here. In Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed. 2d 662 (1974) the Supreme Court held "that the eleventh amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court." That holding would seem to have overruled the Ninth Circuit decision in Lidie v. State of California, 478 F.2d 552 (9th

[5] *See* page 44 [52a] *infra.*

Cir. 1973) upon which Skehan relies, and to have limited the applicability of cases such as Clark v. Barnard, *supra.* See Jordan v. Gilligan, 500 F.2d 701 (6th Cir. 1974), vacating as void under rule 60(b) a judgment awarding attorneys fees against the state. But see Jordan v. Fusari, 496 F.2d 646 (2d Cir. 1974). Edelman v. Jordan, *supra,* also reversed Jordan v. Weaver, 472 F.2d 985 (7th Cir. 1973) which had held that in connection with equitable relief against individual defendants a retroactive monetary award could be made from state funds.[6] Thus if under Pennsylvania law the College is an agent of the Commonwealth, state sovereign immunity would preclude the award of any relief against it directly and any but prospective monetary relief, equitable or legal, in an order directed against the individual defendants. *Edelman,* while not ruling on the

[6] The Court approved the Second Circuit's decision in Rothstein v. Wyman, 467 F.2d 226 (2d Cir. 1972), cert. denied, 411 U.S. 921, 93 S.Ct. 1552, 36 L.Ed.2d 315 (1973), [94 S.Ct. 1347], which had been followed in recent decisions of the Fourth and Eighth Circuits, Dawkins v. Craig, 483 F.2d 1191 (4th Cir. 1973) and Like v. Carter, 486 F.2d 552, 554 (8th Cir. 1973), petition for cert. filed sub nom. Burns v. Doe (U.S. Sept. 11, 1973) (No. 73-406). The Court overruled its decisions in Sterrett v. Mothers' and Children's Rights Organization, 409 U.S. 809, 193 S.Ct. 68, 34 L.Ed.2d 70 (1972), aff'g 2 CCH Pov. L. Rptr. ¶15,384 (N.D. Ind. 1972) (3-judge court); State Dep't of Health and Rehabilitative Services v. Zarate, 407 U.S. 918, 92 S.Ct. 2462, 32 L.Ed.2d 803 (1972), aff'g 347 F. Supp. 1004 (S.D. Fla. 1971) (3-judge court); Wyman v. Bowens, 397 U.S. 49, 40 S.Ct. 813, 25 L.Ed.2d 38 (1970), aff'g 304 F. Supp. 717 (S.D. N.Y. 1968) (3-judge court) (*see* order at [1968-71 transfer binder] CCH Pov. L. Rptr. ¶10,506); and Shapire v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969), aff'g 270 F. Supp. 331, 338 n. 5 (D. Conn. 1967) (3-judge court), to the extent payment of retroactive benefits was ordered in these cases. *See also* note 7 *infra.*

matter specifically, appears to bar the award of attorneys fees from the state treasury as well.[7] But if the College is

[7] The contention could be made that, by failing to expressly overrule its summary affirmance in Sims v. Amos, 409 U.S. 942, 93 S.Ct. 290, 34 L.Ed.2d 215 (1972), aff'g 336 F.Supp. 924 (M.D. Ala. 1972) (3-judge court) of an award of attorneys fees against state officers which was to be satisfied from the state treasury, the Court meant to leave the issue open. *See* Gates v. Collier, 489 F.2d 298 (5th Cir. 1973), following *Sims* and quoting the jurisdictional statement raising the eleventh amendment issue before the Court. Such a conclusion would, however, be inconsistent with the *Edelman* Court's rationale. We attribute the Court's omission to inadvertence. For a listing of other decisions overruled, *see* note 6 *supra*. *See also* Jordon v. Gilligan, *supra*, finding, after *Edelman*, an eleventh amendment bar to the award of attorneys fees. *But cf.* Jordan v. Fusari, *supra*.

Skehan, pointing to language in Justice Marshall's dissent in Edelman v. Jordan, *supra*, contends that the liability of the Commonwealth for retroactive benefits in his case is still open. Justice Marshall wrote:

> "It should be noted that there has been no determination in this case that state action is unconstitutional under the Fourteenth Amendment. Thus, the Court necessarily does not decide whether the States' Eleventh Amendment sovereign immunity may have been limited by the later enactment of the Fourteenth Amendment to the extent that such a limitation is necessary to effectuate the purposes of that Amendment, an argument advanced by an *amicus* in this case. In view of my conclusion that any sovereign immunity which may exist has been waived, I also need not reach this issue." 42 U.S.L.W. at 4432 n. 2 [94 S.Ct. at 1371].

An appreciation of this cryptic comment requires some refined analysis of the issues dealt with in Justice Rehnquist's majority opinion. Claims for money against a state can arise in three separate legal frameworks. First, the claim may be based upon state law, purely and simply; breach of contract, for example. Second, it may be based upon federal law made binding upon the states by

a subsidiary governmental unit both as a matter of Pennsylvania law under the *Ayala* case and as a matter of the federal law of state sovereign immunity, nonprospective monetary relief is available. *See* Edelman v. Jordan, [94 S.Ct. 1347]. We do not deem it appropriate on this record to make a determination into which category Pennsylvania law places the College, especially since that record was not developed with the benefit of the *Ayala* and *Brown* cases in Pennsylvania and the *Edelman* case in the Supreme Court. On remand the district court should make an appropriate determination. If it concludes that the College is a subsidiary governmental unit, an appropriate decree can include retroactive pay and attorneys fees. The extent of any back pay award will depend upon the court's findings on the article 5(e) and first amendment nonrenewal contentions.

virtue of the supremacy clause; nonpayment of benefits mandated by the Social Security Act, for example. Third, it may be based upon the fourteenth amendment, which binds the states directly and under §5 of which Congress has the power to create remedies. *Edelman* involves retroactive welfare benefits withheld in violation of the Social Security Act, and thus falls in the second legal framework. A fourteenth amendment claim provided a basis for federal jurisdiction, but was not decided. *See* Hagans v. Lavine, 42 U.S.L.W. 4381, 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974). Thus Justice Marshall is technically correct that *Edelman* does not dispose of the third category. But the majority opinion expressly overrules Shapiro v. Thompson, *supra*, State Department of Health and Rehabilitative Services v. Zarate, *supra*, and Wyman v. Bowens, *supra*, all fourteenth amendment cases. We think *Edelman* must be read as closing the door on any money award from a state treasury in any category.

B. *The Individual Defendants*

(12) The individual defendants are not protected by sovereign immunity. Even if the College is immune, they may be ordered to reinstate Skehan at least until such time as he has been afforded such hearing as the court finds is required. As Edelman v. Jordan makes clear, that relief may include the payment of his salary prospectively out of College funds even though the College itself may be found to enjoy state sovereign immunity. As to back pay and attorneys fees, even if the College is immune there remains the question whether the individual defendants should be held liable. Such a recovery against individual defendants would be in the nature of damages, rather than as a part of the equitable remedy of reinstatement. Such a recovery of damages, as distinguished from reinstatement, must be predicated upon conduct deemed to be tortious under federal law, Bell v. Hod, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946), 42 U.S.C. §1988, or state law, 42 U.S.C. §1988. The Attorney General on behalf of the individual defendants pleaded official immunity. We have held that a resolution of that defense requires the development of the facts as to whether the defendants in question are in positions where they exercise such discretionary governmental functions as to entitle them to official immunity. Safeguard Mutual Insurance Co. v. Miller, 472 F.2d 732, 734 (3d Cir. 1973); Lasher v. Shafer, 460 F.2d 343, 348 (3d Cir. 1972); *see* Bauers v. Heisel, 361 F.2d 581 (3d Cir. 1966), cert. denied, 386 U.S. 1021, 87 S.Ct. 1367, 18 L.Ed.2d 457 (1967). The district court made no findings on whether the individual defendants exercise such discretionary governmental functions, but unlike Scheuer v. Rhodes, 42 U.S.L.W. 4543, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974), Safeguard Mutual Insurance Co. v. Miller, *supra* and Lasher v. Shafer, *supra*, the position of each defendant is clear in the record, and the Pennsylvania statutes defining their duties establish that they exercise discretionary governmental functions.[8] Pa. Stat. Ann. tit. 24, §20-2008.2 (Board of Trustees); Pa. Stat. Ann. tit. 24, §§20-2003.1, 20-2003.2, 20-2004 (Secretary of Education); Pa. Stat. Ann. tit. 24, §§20-2004, 20-2004.1 (President). Of course, as indicated above, this official immunity from claims for damages and attorneys fees does not preclude injunctive relief. Ex parte Young, 209 U.S. 203, 28 S.Ct. 441, 52 L.Ed. 714 (1908); Safeguard Mutual Insurance Co. v. Miller, 472 F.2d at 734-735. Thus, to the extent that the order appealed from denied recovery of back pay and attorneys fees from the individual defendants, we affirm, though for different reasons than relied on by the district court.

C. *Attorneys Fees*

(13) Although it found that a due process violation had taken place and awarded nominal damages, the court refused to award Skehan attorneys fees. Such awards have repeatedly been held to be appropriate in suits seeking redress for improper dismissal. *E.g.*, Stolberg v. Members of the Board of Trustees, 474 F.2d 485 (2d Cir. 1973); Donahue v. Stauton, 471 F.2d 475, 482-483 (7th Cir. 1972), cert. denied, 410 U.S. 955, 93 S.Ct. 1419, 35 L.Ed.2d 687 (1973); Jinks v. Mays, 350 F. Supp. 1037 (N.D. Ga. 1972). *See* Cooper v. Allen, 467 F.2d 836, 840 (5th Cir. 1972). Attorneys fees have also been awarded

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[8] The district court did find, as required by *Scheuer*, that the constitutional deprivation was technical in nature and "not the product of bad faith on the part of Defendants." Order of June 12, 1973 (unreported), at 2.

frequently in civil rights cases not involving dismissals from employment. *E.g.*, Knight v. Auciello, 453 F.2d 852 (1st Cir. 1972); Lee v. Southern Homes Sites Corp., 444 F.2d 143 (5th Cir. 1971); N.A.A.C.P. v. Allen, 340 F. Supp. 703 (M.D. Ala. 1972); Dyer v. Love, 307 F. Supp. 974 (N.D. Miss. 1969). See Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968). The district court refused to make such an award because "the constitutional deprivation was technical in nature; it was not the product of bad faith on the part of the Defendants." Order of June 12, 1973 (unreported), at 2. Undoubtedly this conclusion was reinforced by the district court's ruling, which we have reversed, that it could substitute its decision for the due process which the College should have afforded. Withholding an award of attorneys fees in a case where a constitutional violation has been established removes a substantial incentive toward efforts looking to vindicate Constitutional rights. It is true, as the district court points out, that Skehan was pursuing an individual, not a class remedy. But the public has an interest in having its state-related institutions act in compliance with the fourteenth amendment. We therefore disapprove the reasons advanced by the district court for rejecting the attorneys fees request.

That does not end the inquiry, however. We have held that the individual defendants are covered by official immunity. If an attorneys fees award is to be made it must be made against the College. Whether such an award can be made against it will, as we pointed out above, depend upon its status.

VI. JURISDICTION

(14) Skehan asserts jurisdiction under 28 U.S.C. §1331 and under 28 U.S.C. §1343(3), (4) and the Civil Rights Acts. The jurisdictional amount requisite to support jurisdiction under §1331 is pleaded, and the claim for recovery in excess of $10,000 clearly is not frivolous. Jurisiction over the individual defendants is clear both under §1331 and under §1343 and 42 U.S.C. §1983. Because the requisite jurisdictional amount for §1331 is pleaded, the fact that the College is not a "person" within the meaning of 42 U.S.C. §1983 is not significant. Thus we have no occasion in this case to determine whether, in view of the Commonwealth's abandonment of state sovereign immunity with respect to subgovernmental units in the *Ayala* case, those units may be sued in a federal court where, because the claim is less than $10,000, jurisdiction must be predicated on 28 U.S.C. §1343(3), (4). *But see* 42 U.S.C. §1988. There is §1331 jurisdiction to award relief against the College if under Pennsylvania law it is not an agency of the Commonwealth covered by the Commonwealth's immunity.

VII. CONCLUSION

The judgment of the district court will be vacated and the case will be remanded for findings of fact:

1. as to the governmental status of Bloomsburg State College;

2. as to the nature of the interest created under Pennsylvania law by article 5(e) of the Statement of Policy for Continuous Employment and Academic Freedom at Bloomsburg State College;

3. as to whether the decision not to renew Skehan's contract after 1970-71 was based on stands on campus issues with which the administration disagreed.

Since we have held that the individual defendants are entitled to official immunity, if the court should find that the College is covered by the Commonwealth's state sovereign immunity neither back pay nor attorneys fees could be awarded. If the court should find that the College is within the *Ayala* rather than the *Brown* case an award of back pay should be considered. The extent of such an award will depend upon the court's findings as to the article 5(e) claim and as to the reason for nonrenewal. If Skehan's only contract right expired by its terms at the end of the 1970-71 academic year, and there was no first amendment violation, the back pay award should cover the 1970-71 period only. The claim for reinstatement would then be moot. But if either the article 5(e) claim or the first amendment claim should be decided in Skehan's favor, the court should consider the award of back pay to date if the College is not immune, and also prospective reinstatement, as to which there is no immunity problem, at least until appropriate college procedures have taken place. If the College is not immune the court should also reconsider its ruling on the award of attorneys fees.

To the Clerk of the Court

Please file the foregoing opinion.

Circuit Judge

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 73-1613

Dr. Joseph T. Skehan,

Appellant

vs.

Board of Trustees of Bloomsburg State College and Dr. Robert Nossen and Dr. Charles Carlson and John Pittenger, Superintendent of Education Commonwealth of Pennsylvania and Bloomsburg State College

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(D.C. Civil Action No. 72-644)

On Appeal from the United States District Court for the Middle District of Pennsylvania

Present: Biggs, Gibbons and Garth, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Dis-

trict Court, filed May 11, 1973, be, and the same is hereby vacated and the cause is remanded for findings of fact and further proceedings consistent with the opinion of this Court.

Attest:

(s) Thomas F. Quinn
Clerk

(Seal)

May 3, 1974

A True Copy:

(s) Thomas F. Quinn
Thomas F. Quinn
Clerk

(Received & Filed May 3, 1974, Thomas F. Quinn, Clerk)

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 72-644

Dr. Joseph T. Skehan,
Plaintiff

vs.

Board of Trustees of Bloomsburg State College, et al.,
Defendants

OPINION

[358 Fed. Supp. 430 (1973)]

Muir, *District Judge.*

This suit, brought pursuant to 28 U.S.C. §§1343, 2201, 2202, and 42 U.S.C. §§1981, 1983 and 1985, alleges deprivations of Plaintiff's constitutional rights in connection with the termination of his employment at Bloomsburg State College in October, 1970. Plaintiff requests damages and injunctive relief, including reinstatement. On January 11 and 12, 1973, a hearing was held to consider Plaintiff's request for a preliminary injunction. This request was denied by the court in an Opinion dated January 31, 1973, — F. Supp. —, because the nearly two-year delay in instituting this suit indicated that speedy action was not required. The case was placed on the April trial

list for a hearing on final injunction and damages. Subsequently, the parties waived a further hearing on the merits and rested on the record developed at the January 11 and 12, 1973 hearing.

Plaintiff Joseph T. Skehan was appointed Associate Professor of Economics at Bloomsburg State College in January, 1969. His contract was renewed for the 1969-1970 and the 1970-1971 school years. At no time did Dr. Skehan have tenure rights to continued employment.

Dr. Skehan did not confine himself to strictly academic duties. He assumed an activist position on many of the issues raised in the campus community, a position often grating to the administration at Bloomsburg. During the Spring of 1969, Dr. Skehan urged the formation of independent faculty and student organizations. In November and December, 1969, he strongly protested against the dismissal of Professor Deake Porter of the Economics Department, and acted as Porter's academic advisor in the matter. Dr. Skehan was also active in the protest over the firing of Dr. Maxwell Primack, and was appointed to the American Association of University Professors' Committee established to investigate that incident. In April, 1970, Dr. Skehan served as faculty advisor to students at Bloomsburg who expressed their dissatisfaction with the appointment of Defendant Nossen as President of the college.[1]

In addition to the administration's apparent displeasure with Dr. Skehan's extra-curricular activities, there

[1] Dr. Skehan also actively protested against United States policy in Vietnam. However, there was no evidence suggesting that his views differed from those of the administration, or that the administration was aware of Dr. Skehan's activities.

was some criticism of the manner in which he performed his teaching duties. When Dr. Skehan was hired to teach at Bloomsburg in January, 1969, he was given a six-month "trial" contract because he came to Bloomsburg as a result of the non-renewal of his contract at Seton Hall University, the institution by which he was employed from 1965 until the Spring of 1968. Soon after he began teaching at Bloomsburg, Dr. Saini, the Chairman of the Economics Department, discussed with Dr. Skehan the impropriety of absenting himself from Friday afternoon classes by making arrangements with the students to meet at some other time or with other colleagues to take charge of his classes. Also discussed was the difficulty students were having in seeing Dr. Skehan about problems relating to course work. Dr. Skehan assured Dr. Saini that he would adhere to the applicable regulations at Bloomsburg. Despite these assurances, he arranged, without proper approval, to have some other faculty members take charge of his class during an examination in May, 1969.

Dr. Skehan's contract was renewed for the 1969-1970 academic year. However, as early as February, 1970, he was verbally advised by Dr. Hoch, Vice-President and Dean of Faculties, that his services would no longer be required after May, 1971. This administration position was formalized on May 19, 1970, when Defendant Nossen sent to Dr. Skehan an offer of reappointment for the 1970-1971 academic year with the understanding that 1971 was to be the terminal year of his employment at Bloomsburg. Dr. Skehan did not execute the offer of reappointment, but on May 28, 1970 he sent to Defendant Nossen a letter which stated in part:

> "According with provisions on page three of Bloomsburg State College's 'Statement of Policy for

> Continuous Employment and Academic Freedom' I have re-appointment for the Academic year 1970-71. Your letter confirms the 1970-71 re-appointment. I intend to fulfill the 1970-71 appointment."

By letter dated June 1, 1970, Defendant Nossen informed Dr. Skehan that failure to execute the offer of reappointment by June 8, 1970, would be interpreted as a refusal of the offer. Dr. Skehan apparently appealed directly to the Board of Trustees. On June 15, 1970, Defendant Nossen sent to Dr. Skehan a letter which stated in part:

> "The College has prepared a contract form which is applicable to all persons offered appointment. Your refusal, to this point, to return the contract in accord with [the Board's] prescribed procedures continues to indicate to [the Board] your disregard for College procedures. Nevertheless, in view of the original intention to provide due notice, [the Board] will accept the alternative letter as an indication of your acceptance of the 1970-1971 appointment as terminal."

On September 18, 1970, Dr. Skehan was sent a standard memorandum advising him that his salary for the 1970-1971 school year was $13,680.00. I find that Dr. Skehan had a contract of employment for the 1970-71 academic year.

The events giving rise to Dr. Skehan's midterm discharge occurred in the Fall of 1970. In February, 1970, the Economics Department met and adopted a proposed schedule of courses to be given in the 1970 Fall semester. Pursuant to this proposed schedule, Dr. Skehan was to teach one advanced course in micro economics, and three principles courses in micro and macro economics. Shortly before August 27, 1970, the College Registrar issued a

memorandum to all department chairmen stating that any desired changes in the proposed schedules should be submitted on or before August 27, 1970. No changes were submitted by the Economics Department prior to that deadline. However, on September 12, 1970, three days before classes began, the Economics Department met and approved several proposed schedule changes involving Dr. Skehan and other members of the Department. The request to change the schedule was denied by Vice-President Hoch on September 14, 1970, and the denial was communicated to Dr. Skehan on September 15, 1970. Nevertheless, Dr. Skehan and Professor Porter followed the schedule as changed at the September 12, 1970 Department meeting. Following receipt on September 22, 1970, of a letter from Dr. Hoch directing him to follow the official class schedule, Dr. Skehan began meeting with his classes under the official schedule and with his classes under the requested schedule. Dr. Skehan and Professor Porter both participated in the advanced micro economics course, officially assigned to Dr. Skehan. Professor Porter prepared the course materials and led the classroom procedures.

Pursuant to a request by Dr. Skehan, Vice-President Hoch arranged a meeting on September 29, 1970, to discuss the scheduling problems. At the meeting, attended by the members of the Economics Department and Vice-President Hoch, Dr. Skehan and Professor Porter were given an opportunity to present their views. Vice-President Hoch stated that he denied the requested schedule changes because he felt that the changes were requested for purely personal reasons, and because the changes were not submitted prior to the August 27, 1970 deadline. Other members of the Economics Department, including the acting chairman, Mr. Ross, stated that the Department had

sought schedule adjustments and that in light of the Vice-President's veto of the proposed schedule changes, the official schedule should be adhered to. At the conclusion of the meeting, Vice-President Hoch read a statement which provided in part:

> ". . . Dr. Skehan and Mr. Porter are hereby directed to follow the official class schedule, which appears in the Master Class Schedule for the fall semester of the college year 1970-71, beginning Wednesday, September 30, 1970, at 8:00 A.M.
>
> "It is only fair to warn each of you gentlemen that immediate and direct administrative action will follow your failure to teach your classes as scheduled in the official schedule book."

A similar directive and warning was provided to Dr. Skehan in a letter to him from Vice-President Hoch dated September 30, 1970.

On or about October 1, 1970, Dr. Skehan was observed teaching courses not assigned to him under the official schedule. Apparently, Dr. Skehan and Professor Porter utilized a procedure similar to the one employed between September 22, and September 29, whereby both professors participated jointly in the disputed courses. However, it does appear that Dr. Skehan was principally in charge of the Labor Economics course officially assigned to Professor Porter. This was in violation of Vice-President Hoch's directive, in spirit if not in letter. As a result of Dr. Skehan's actions, he was notified by President Nossen by letter dated October 9, 1970, that he was relieved of teaching duties pending a final hearing. Dr. Skehan was given five days in which to account for his actions by letter to President Nossen. Dr. Skehan refused to make

an accounting, and on October 19, 1970, was removed from the payroll effective October 17, 1970. On October 23, 1970, the Board of Trustees approved Dr. Skehan's dismissal.

On December 1, 1970, the Committee on Academic Affairs conducted a hearing concerning the dismissal of Dr. Skehan. Dr. Skehan appeared only to state that he would not participate in the hearing. On the basis of correspondence and records submitted by the administration, the Committee unanimously approved the dismissal action. Dr. Skehan submitted no material for consideration at the hearing.

(1) Plaintiff first alleges that he was discharged from his employment with Bloomsburg State College because of his stands on campus issues which were contrary to the administration's positions, in violation of his First and Fourteenth Amendment rights to free speech. However, the Plaintiff has not shown by a preponderance of the evidence that this allegation is true. On the contrary, I find that the Plaintiff was discharged because of his refusal to follow administrative directives relating to the schedule of classes in the Fall of 1970. He was not discharged for reasons prohibited by the Constitution.

(2) Next, Plaintiff contends that he was deprived of his right to procedural due process when he was denied a hearing prior to discharge. The Supreme Court has held that a nontenured professor has a constitutional right to a statement of reasons and a hearing on a university's decision not to renew his contract if he can show that the nonrenewal deprives him of an interest in "liberty" or a "property" interest in continued employment. Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d

548 (1972); Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). Likewise, a college professor dismissed during the term of his contract possesses a property interest safeguarded by due process. Board of Regents v. Roth, *supra*, 408 U.S. at pp. 576-577, 92 S.Ct. 2701. See Wieman v. Updegraff, 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216 (1952). This is precisely the situation in the case at bar. Therefore, Plaintiff's dismissal during the term of his contract for the 1970-71 academic year at Bloomsburg State College entitled him to a hearing on the reasons for his dismissal.

(3) The Defendants contend that Plaintiff was, in fact, afforded a hearing at the September 29, 1970 meeting with Vice-President Hoch. The September 29 meeting was called to discuss the scheduling controversy which ultimately gave rise to Plaintiff's discharge effective October 17, 1970. However, the meeting was concerned with events which transpired prior to September 29. It was Plaintiff's subsequent failure to abide by the directive propounded at the meeting which precipitated his discharge. Although Plaintiff was not constitutionally entitled to reargue his position on the question of which schedule was controlling, he was entitled to a hearing at which he might have attempted to justify his actions after September 30, 1970, or to have presented reasons why dismissal was not the appropriate sanction.

(4, 5) The hearing on December 1, 1970 before the Committee on Academic Affairs did not fulfill the constitutional requirements of procedural due process in this case. The hearing was held 1½ months after Plaintiff's discharge. Absent special circumstances, due process requires that one who is deprived of a protected interest be

given a hearing prior to the deprivation. Board of Regents v. Roth, *supra*, 408 U.S. at p. 570, n. 7, 92 S.Ct. 2701; Commonwealth of Pennsylvania ex rel. Rafferty v. Philadelphia Psychiatric Center, 356 F. Supp. 500 (E.D. Pa. 1973). See Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972). The case at bar does not represent the kind of extraordinary situation in which the requirement of a prior hearing is relaxed. See Phillips v. Commissioner, 283 U.S. 589, 597, 51 S.Ct. 608, 75 L.Ed. 1289 (1931); Central Union Trust Co. v. Garvan, 254 U.S. 554, 566, 41 S.Ct. 214, 65 L.Ed. 403 (1921); Citta v. Delaware Valley Hospital, 313 F. Supp. 301, 309-310 (E.D. Pa. 1970).

(6) Having decided that Dr. Skehan was deprived of his constitutional right to a prior hearing, I turn now to the question of appropriate relief. Plaintiff asks for reinstatement with back wages and damages. In my view, reinstatement with back wages would be inappropriate in the case at bar in light of (1) the Court's finding that the Plaintiff was not discharged for exercising his constitutional rights, and (2) Plaintiff's two-year delay in instituting this action.[2] Cases in which courts have ordered reinstatement because of a lack of procedural due process presented situations where either the court found that the Plaintiff was discharged for constitutional impermissible reasons, see, e.g., Commonwealth of Pennsylvania ex rel. Rafferty v. Philadelphia Psychiatric Center, 356 F. Supp. 500 (E.D. Pa. 1973), or where the Plaintiff instituted the action shortly after the constitutional deprivation, see, e.g.,

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[2] Plaintiff was discharged on October 19, 1970, effective October 17, 1970. The complaint was filed October 10, 1972 in the Eastern District of Pennsylvania.

Karstetter v. Evans, 350 F. Supp. 209 (N.D. Tex. 1971); Newcomer v. Coleman, 323 F. Supp. 1363 (D. Conn. 1970); Lafferty v. Carter, 310 F. Supp. 465 (W.D. Wis. 1970). Furthermore, the recent Supreme Court pronouncements concerning procedural due process in the context of the dismissal of a state employee indicate that reinstatement is not an appropriate remedy. In remanding the case to the lower courts, the Court in Perry v. Sindermann, *supra*, stated that Plaintiff's proof of a property interest would entitle him to a hearing prior to dismissal, but

> ". . . would not, of course, entitle him to reinstatement. But such proof would obligate college officials to grant a hearing at his request, where he could be informed of the grounds for his nonretention and challenge their sufficiency." 408 U.S. at 603, 92 S.Ct. at 2700.

(7) It appears from the above statement in *Perry* that an appropriate remedy would be to order the Defendants to give Dr. Skehan a hearing at this time. Under normal circumstances, I would take such a course. However, this is not the usual case, and there are numerous considerations militating against ordering a hearing to be held 2½ years after Plaintiff's discharge. Most important, I feel that a hearing at this time would be fruitless. I have found that Plaintiff's dismissal was not grounded upon constitutionally impermissible reasons. Therefore, were a hearing to be held at this time, Plaintiff could only attempt to justify his refusal to obey the administrative directive on class scheduling after September 30, 1970. I have heard Plaintiff's testimony on this matter, and I find it highly unlikely that a hearing committee, considering the same evidence, would reverse the administration's decision to

discharge the Plaintiff. That decision was eminently reasonable under the circumstances. It has been held that where the Plaintiff was deprived of his right to procedural due process the court should not refer the case back for a due process hearing when such a hearing would not result in altering the action taken against the Plaintiff. Ferguson v. Thomas, 430 F.2d 852 (5th Cir. 1970). See Stevenson v. Board of Education of Wheeler County, 426 F.2d 1154 (5th Cir. 1970). The following factors have also affected my decision not to order a hearing at this time: (1) Plaintiff's failure to request, in his complaint or elsewhere, that he now be given a hearing by the college on the reasons for his dismissal; (2) Plaintiff's failure to participate in the postdismissal, December 1, 1970 hearing, which from all appearances, would have been a fair and impartial one; and (3) Plaintiff's long delay in instituting this action.

(8) While Plaintiff was deprived of his constitutional right to a hearing prior to dismissal, the deprivation was technical in nature. By such a classification I do not wish to demean a state employee's right to procedural due process. However, the circumstances surrounding this particular case indicate that had Plaintiff been afforded a hearing prior to his discharge, in all probability the outcome would have been the same. Plaintiff's discharge was based upon facts rationally determined and for reasons unrelated to Plaintiff's exercise of constitutional rights. The Plaintiff has not proven any actual damages arising from Defendant's failure to give him a hearing. However, nominal damages are proven by proof of a deprivation of a right to which the Plaintiff is entitled. Basista v. Weir, 340 F.2d 74 (3d Cir. 1965). Therefore, the Clerk will be di-

rected to enter judgment in favor of the Plaintiff for one dollar, together with costs.

An appropriate order will be entered.

This opinion shall constitute the court's findings of fact and conclusions of law under F.R.Civ.P. 52 (a).

(s) Muir
Muir
United States District Judge

Dated: May 9, 1973

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 72-644

Dr. Joseph T. Skehan,
Plaintiff

vs.

Board of Trustees of Bloomsburg State College, et al.,
Defendants

ORDER

June 12, 1973

The background of this order is as follows:

By Opinion and Order dated May 9, 1973, — F. Supp. —, this Court found that the Plaintiff had been deprived of his right to procedural due process and ordered the Clerk to enter judgment in favor of Plaintiff for one dollar, together with costs. Before the Court at this time are motions by Plaintiff to amend the judgment and for the allowance of attorney's fees.

In requesting an amendment of the judgment, Plaintiff contends that he is at least entitled to monetary damages for the two years that he has been without employment. It is elementary that the purpose of damages is to put the Plaintiff in the same position, so far as money can

do it, as he would have been had the Defendants' breach of duty not occurred. See Milwaukee and St. P. R. Co. v. Arms, 91 U.S. 489 (1875). In the May 9, 1973 Opinion, the Court found that while Plaintiff was deprived of his right to a hearing prior to discharge, his dismissal was not based upon constitutionally improper reasons, that the decision to discharge Plaintiff was eminently reasonable, and that in all probability the outcome would have been the same had Plaintiff been given a prior hearing. In other words, any damage sustained by Plaintiff resulted from his refusal to follow administrative directives relating to class scheduling, Opinion at p. 8, not from the Defendants' failure to provide him with a proper due process hearing. Under these circumstances, it would be unjust for the Court to award more than nominal damages.

In regards to Plaintiff's motion for the allowance of attorney's fees, the Court is aware that it has the discretionary authority to award attorney's fees in civil rights cases when justice so requires. Lee v. Southern Home Sites Corporation, 429 F.2d 290 (5th Cir. 1970). Generally, attorney's fees may be awarded when either (1) the Defendants have acted unreasonably or in bad faith, see Williams v. Kimbrough, 415 F.2d 874 (5th Cir. 1969); (2) the result of Plaintiff's efforts has been the creation of a fund or other economic benefit to be shared by members of a represented class, see Guardian Trust Co. v. Kansas City Southern Ry. Co., 28 F.2d 233 (8th Cir. 1928), rev'd on other grounds, 281 U.S. 1 (1930); or (3) the result of Plaintiff's efforts has been the enforcement of a right, or the enjoinment of a constitutional deprivation, which directly benefits a large segment of the community, see Bradley v. School Board of City of Richmond, Virginia, 53 F.R.D. 28 (E.D. Va. 1971). This later category almost

uniformly involves racial desegregation cases. The facts in the case at bar fit none of these categories. As pointed out in the May 9, 1973 Opinion at p. 12, the constitutional deprivation was technical in nature; it was not the product of bad faith on the part of the Defendants. Nor can this suit be deemed directly to benefit a large segment of the community. Plaintiff brought the action to vindicate his personal rights under his contract and under the U.S. Constitution. To the extent that Bates v. Hinds, 334 F. Supp. 528 (N.D. Tex. 1971), would compel a different conclusion on the question of the appropriateness of an award of counsel fees in this case, I decline to follow it.

NOW, THEREFORE, IT IS ORDERED THAT:

1. Plaintiff's motion to amend the judgment is denied.

2. Plaintiff's motion for the allowance of attorney's fees and costs is denied.

(s) Muir
Muir
United States District Judge